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In the

Supreme Court of the United States

October Term, 1954.

No. 184.

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, et al., *Appellants,*

vs.

LEE OPTICAL OF OKLAHOMA, INC., et al., *Respondents.*

No. 185.

LEE OPTICAL OF OKLAHOMA, INC., et al., *Appellants,*

vs.

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, et al., *Respondents.*

On Appeals from the District Court of the United States for the Western District of Oklahoma.

BRIEF FOR RESPONDENTS-APPELLANTS LEE OPTICAL OF OKLAHOMA, INC., ET AL.

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In the

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October Term, 1954.

No. 184[1].

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, et al., *Appellants*,

vs.

LEE OPTICAL OF OKLAHOMA, INC., et al., *Respondents*.

On Appeals from the District Court of the United States for the Western District of Oklahoma.

BRIEF FOR RESPONDENTS-APPELLANTS LEE OPTICAL OF OKLAHOMA, INC., ET AL.

Jurisdiction.

This is a civil action in which plaintiffs[2] filed their complaint against defendants Mac Q. Williamson, At-

[1]Together with No. 185, *Lee Optical of Oklahoma, Inc., et al., v. Mac Q. Williamson, Attorney General of the State of Oklahoma, et al.*

[2]Inasmuch as there are two appeals here—No. 184 by defendants from the entire judgment of the trial court, and No. 185 by plaintiffs from a portion of that judgment—the parties will be referred to in this brief as they appeared below.

torney General of the State of Oklahoma and the 77 County Attorneys of that State, requesting a declaration that Sections 2, 3 and 4 of House Bill No. 953 of the 24th (1953) Oklahoma Legislature (59 Okla. St. Ann., §§942, 943 and 944) violate Sections 8 and 10, Article I of the Constitution of the United States and the "due process" and "equal protection" clauses of Section 1 of the XIV Amendment to that Constitution, and further praying injunctive relief, pursuant to the provisions of Sections 2281-2284 of the Judicial Code (28 U. S. C. §§2281-2284), against the enforcement by defendants of said statute. A counterclaim requesting injunctive relief against plaintiffs was filed by the defendants (R. 22-23). The case was heard by a three-judge court, and its judgment holding portions of Sections 2, 3 and 4 unconstitutional was entered March 29th, 1954 (R. 27-29). This Court has jurisdiction to review the judgment entered below by direct appeal by reason of Section 1253 of the Judicial Code (28 U. S. C. §1253). The following decisions sustain the jurisdiction of this Court to review the judgment and decision of the district court: *Palmetto Fire Ins. Co.* v. *Conn.*, 272 U. S. 295; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245; *Herkness* v *Irion*, 278 U. S. 92.

Statute Involved.

House Bill No. 953 of the 24th (1953) Oklahoma Legislature (Chapter 13, Title 59, p. 271, Okla. Session Laws, 1953; 59 Okla. St. Ann., §§941-947), the statute involved in this appeal is set forth in the Appendix, *infra*, pages i-v.

Questions Presented.

The questions presented by these appeals are whether the district court erred in:

(1) Declaring unconstitutional and void those portions of:

(a) Section 2 (59 Okla. St. Ann., §942) which make it unlawful for any person not an Oklahoma licensed ophthalmologist or optometrist "to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person or to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision * * *" except upon written prescriptive authority from an Oklahoma licensed ophthalomogist or optometrist;

(b) Section 3 (59 Okla. St. Ann., §943) which make it unlawful for any person "to solicit the sale of * * * frames, mountings * * * or any other optical appliances * * * by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement; * * *," and

(c) Section 4 (59 Okla. St. Ann., §944) which provide that "no person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store."

(2) Enjoining the Attorney General of Oklahoma and each of the 77 County Attorneys of that State from enforcing or attempting to enforce the above provisions of House Bill No. 953 by the criminal or civil proceedings provided for in said statute;

(3) Failing to hold unconstitutional and void those portions of Section 3 (59 Okla. St. Ann., §943) that make it unlawful for any person "to solicit the sale of spectacles, eyeglasses, lenses, * * * prisms * * * by radio, window display, television, telephone directory display advertisement, or by any other means of advertisment; * * *," and

(4) Refusing to admit in evidence plaintiffs' offered Exhibit 2 (R. 459; 220, 265).

STATEMENT OF THE CASE.

The district court, all three judges concurring, found Section 2 unconstitutional in so far as it prohibited any person not an Oklahoma licensed optometrist or ophthalmologist from fitting, adjusting and adapting lenses, frames, prisms or any other optical appliances to the face of a person, duplicating and placing into frames, lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction except upon the written prescription of an Oklahoma licensed ophthalmologist or optometrist (R. 44-53). It also found unconstitutional, Judge Murrah dissenting, the complete advertising prohibition of Section 3 in so far as it related to *frames, mountings, or other optical appliances* except completed eyeglasses (R. 53-58) and the prohibition of Section 4 against the renting of space to an ophthalmologist or optometrist in a retail establishment (R. 58-60). In conformity with such findings, the court's judgment declared those portions of the statute to be unconstitutional and further permanently enjoined the Attorney General of Oklahoma and the defendant county attorneys from enforcing such provisions against plaintiffs, and defendant Zales Jewelry Company from terminating its lease with Dr. Rips under Section 4 of the statute (R. 27-29).

The facts pertinent to a determination of these appeals are the following:

In the field of visual care, there are three main groups —the ophthalmologist[3], the optometrist and the optician (R. 116, 158, 310). The ophthalmologist is a medical doctor specializing in eye care authorized by law and trained to

[3]There is no difference between an oculist and an opthalmologist, the title "oculist" being synonymous with "ophthalmologist" (R. 333).

refract eyes and to diagnose and treat pathological conditions of the eye by medicine and surgery (R. 90, 333). The optometrist measures the refractive error of the human eye by means other than the use of drugs, gives eye training and almost invariably sells the eyeglasses prescribed by him. He also sells frames, replacement lenses and duplicates eyeglasses. Unlike the ophthalmologist, he does not issue a prescription which may be filled by an optician of his patient's choice. He is not authorized by law to treat diseases of the eye or to perform eye surgery (R. 133, 159-161, 268, 341-342, 408-411). The optician—a skilled craftsman or artisan—is engaged in the compounding, filling and adapting of prescriptions for eyeglasses and the sale of frames, replacement lenses and other accessories (R. 97-98, 161-164, 268-269, 276-277, 313-314, 412-425). He does not examine eyes or prescribe lenses therefor (R. 109, 169, 327, 349). Of the three groups, the optician is the oldest, dating from the Thirteenth Century at least and possibly from the pre-Christian Era (R. 158-159, 269, 342, 408). He traces his heritage through Thomas Young, an English physicist, Hermann Ludwig von Helmholz, a German physicist, John Dollond, an Eighteenth Century English optician, Sir Isaac Newton, Galileo, Rene Descartes, Christian Huygens, a Dutch physicist, Roger Bacon, and Aristotle (R. 158-159, 408)[4]. The ophthalmologist came next, and lastly the optometrist, who first appeared on the scene about the beginning of the Twentieth Century as a "refracting optician" (R. 160). Subsequently, he assumed the name of "optometrist" and obtained legisla-

[4]Berens, *The Eye and Its Diseases* (2nd ed., 1949), pp. 1-5; Pamphlet, *Optometry, the Profession, Its Antecedents, Birth and Development* (The Chilton Co., 1947); Majersky and Koch, *Criticism of Certain Dispensing Practices and Its Effect Upon Optometry*, 25 The American Journal of Optometry and Archives of American Academy of Optometry 188-191 (1948); Arrington, *History of Optometry* (1929), pp. 13-27.

tive recognition of his refractive functions as a separate profession or vocation (R. 408-410)[5].

Plaintiffs Lee Optical and Carp are "dispensing opticians" and as such do all of the things that historically and customarily have been done by opticians (R. 206)[6].

Functions of the Dispensing Optician.

The work of the dispensing optician has for centuries been a separate, skilled vocation dealing in the fabrication and sale of eyeglasses and parts therefor (R. 158-159, 425). The optician is, and has been traditionally, both a skilled craftsman or artisan and a vendor of merchandise (R. 98, 116-117, 145, 269, 278). The optician is a vital adjunct to the ophthalmologist in the practice of his profession and is to the ophthalmologist what the pharmacist is to the medical practitioner (R. 97). He is a right arm to the modern ophthalmologist and while the optician does not need the educational training of an ophthalmologist to competently perform his functions, yet he is indispensable to the ophthalmologist (R. 97, 269, 277, 282, 335-336).

To fulfill his function as a skilled craftsman, the optician must have a knowledge of the science and terminology of optics and eye care, together with mechanical skill in the manipulation of the machines and tools necessary to the fabrication of eyeglasses and the fitting or adjustment to the faces of persons (R. 278, 335, 342, 408, 412).

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[5]The first state to do so was Minnesota in 1901; the last were Missouri and Texas in 1921.

[6]In its *amicus curiae* brief (p. 16, footnote 8) the American Optometric Association mistakenly assumes that in Oklahoma opticians fit, adjust or apply lenses, frames, prisms, etc., without a prescription, to the face of a person *who does not already wear eyeglasses*. Such assumption is in direct conflict with the findings of the court and the evidence below (R. 46, 109, 145, 151; Complaint, ¶ 11, R. 5-6; Answer, ¶ 8, R. 21). See also, §§492 and 581, 59 Okla. St. Ann., Appendix, pp. v-vi.

At the same time the optician, in fulfilling his merchandising functions, must maintain and furnish to his customers as complete a selection of lenses and frames of various sizes, shapes, color and adornment as may be required to suit his customers' individual taste and as may be necessary to obtain a proper fitting pair of glasses (R. 121, 162-163, 377, 437).

As a skilled craftsman, the optician:

(a) Takes the prescription of an ophthalmologist and translates that prescription into the designated kind and power of lenses (R. 97, 117, 161, 276, 313, 368);

(b) Sells new eyeglass frames for existing serviceable lenses with or without a prescription (R. 165);

(c) Fabricates and sells duplicate eyeglasses with or without a prescription (R. 164-165, 314);

(d) Replaces lenses by duplicating existing lenses (R. 165, 371, 373), and

(e) Otherwise repairs, services and adjusts eyeglasses (R. 276-277, 313, 368).

In all of these functions, the optician fits, adjusts and adapts frames to the face and inserts lenses into frames (R. 121, 162, 164, 268-269)[7]. He does not examine eyes or prescribe lenses for the correction of refractive errors in eyes (R. 109, 169, 327, 349).

Duties of the Optician in Filling a Prescription.

In fabricating initial eyeglasses the dispensing optician measures the distance between the pupils of the eye with an ordinary millimeter ruler or other simple measuring

[7]In their answer (R. 20-21) and at the trial defendants contended that plaintiffs in measuring, fitting, adjusting and adapting eyeglasses to the face, placing or replacing lenses into frames and duplicating eyeglasses without the prescription of an Oklahoma licensed ophthalmologist or optometrist on file were violating the provisions of Chapter 11 (practice of medicine) and Chapter 13 (practice of optometry) of Title 59, Oklahoma Statutes, 1951 (R. 177-190).

tool and makes certain that the horizontal distance between the optical centers of the lenses he inserts into the frames coincides with the distance between the pupils of the eyes except in the rare instances where other instructions are given him in a prescription (R. 92-93, 97-98, 118, 123-124, 268-269, 276, 304, 368, 418). He cuts lens blanks of the correction prescribed* by the professional practitioner to proper size and shape and finishes the edges (R. 118-119). And in the case of some dispensing opticians, he either wholly or partially grinds the lenses to the prescribed correction (R. 97-98, 304, 340). He then inserts the lenses into frames and aligns them (R. 120, 314). In most instances involving high corrective lenses, the optician must adjust the eyeglasses so that the distance from the eye to the lens conforms to that specified in the prescription or if that is not possible for reasons of comfort or facial contour, he determines by mathematical tables the difference in the power of the lens required to compensate for the variation in distance of the lens from the eye from that specified in the prescription (R. 92-93, 122, 171-172). Similarly, through his experience and mechanical skill, the optician, when the patient returns, fits and adjusts the completed eyeglasses to the face of his customer, making certain that everything is centered properly, that the frames are of the proper size, and that the eyeglasses are comfortable (R. 93, 97-78, 121, 269, 276-277, 314, 340, 368, 416-421).

Fitting, Adjusting and Adapting to the Face.

The demonstration of plaintiffs' witness, Hill, included at pages 129 to 132 of the record, shows that the optician in adjusting or fitting eyeglasses to the face, uses only

*Most dispensing opticians do not actually grind the lenses but rather maintain a stock of already ground lens blanks which they cut, edge and finish before inserting into frames (R. 118, 268).

such tools as pliers, small screwdrivers and the like, which, coupled with manual dexterity and the judgment acquired from his training and experience, enable him properly to fit and adjust the completed eyeglasses. The skill of an optician in so fitting glasses to the face is not equivalent to the professional knowledge or skill required of either an ophthalmologist or of an optometrist in performing refractions (R. 45, 98, 269). The testimony of Dr. Tullos O. Coston, a pre-eminent Oklahoma ophthalmologist, Dr. Charles Sheard[9], Director Emeritus of the Division of Biophysics of the Mayo Clinic, Dr. Frederick C. Cordes[10], former president of the American Academy of Ophthalmology and Otolaryngology and chairman of the Department of Ophthalmology at the University of California, Dr. Arthur M. Culler, chairman of the Department of Ophthalmology at Ohio State University; Dr. Alson E. Braley, chairman of the Department of Ophthalmology at the University of Iowa; Dr. William L. Benedict[11], executive

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[9]Dr. Sheard is Professor Emeritus of Biophysics under the Mayo Foundation at the University of Minnesota; Professor of Ophthalmic Optics, Rochester College; Lecturer in Ophthalmology at the Graduate School of Medicine, Tulane University; Interim Dean of the Los Angeles College of Optometry; Fellow of the Optical Society of Great Britain; Fellow of the Ophthalmic Institute of Great Britain; Honorary Fellow of the American Academy of Ophthalmology; Fellow of the Research Society of Ophthalmology; Fellow of the American Academy of Optometry; Life Member of the American Optometric Association; Past President of the American Board of Opticianry, and civilian consultant to Bureau of Medicine and Surgery, U. S. Navy, since 1947. He is the author of numerous texts and treatises in the field of Ophthalmic Optics and was a contributor to the section on Physiological Optics in the American Encyclopedia of Ophthalmology. (R. 403-404; Who's Who in America, Vol. 28, p. 2420.)

[10]Dr. Cordes is a Member of the American Ophthalmological Society; Member of the Section on Ophthalmology of the American Medical Association; member of the Association for Research in Ophthalmology; Fellow of the American College of Surgeons; Civilian Consultant in Ophthalmology to the Surgeon General of the United States Army and Surgeon General of the United States Navy, and Editor of the American Journal of Ophthalmology. (R. 275; Who's Who in America, Vol. 28, p. 560.)

[11]Dr. Benedict is Secretary General XVII International Congress Ophthalmology; former President of the American Ophthalmological Society; Member of the American College of Surgeons; Honorary

secretary-treasurer of the American Academy of Ophthalmology and Otolaryngology and former head of the Department of Ophthalmology at the Mayo Clinic, and Dr. Albert N. Lemoine, head of the Department of Ophthalmology at the University of Kansas, establishes that a qualified optician is competent properly to fit and adjust eyeglasses to the face (R. 98-99, 313-314, 276-278, 340-341, 268-269, 371, 425-427). In fact, Doctors Coston, Lemoine, Benedict, Sheard and Braley stated that the optician is better able to do so than an ophthalmologist who receives no training in such mechanical activities and is certainly as able, if not better able, to perform that function than an optometrist, who receives some, but who today is receiving less training in such functions (R. 98-99, 270, 335, 426-429, 343, 371).

Merchandising Functions.

In fulfilling his merchandising functions, the dispensing optician generally maintains a stock of and displays at his place of business various styles and types of frames and frame adornments (R. 93, 161, 162-163). Frames are standard articles of merchandise and come in standard sizes and various styles. Approximately thirty-five per cent of the average dispensing optician's gross income is derived from the sale of frames into which he inserts the customer's old lenses or replacement lenses which he has duplicated from the original lens by the use of a precision instrument known as the lensometer (R. 196-198, 206)[12]. This portion of the optician's business stems from the customer's desire for a new or different style of frame as

Member of the International College of Surgeons; former Professor of Ophthalmology at the University of Minnesota on the Mayo Foundation; Member of the American Board of Ophthalmology; Honorary Member American Board of Optometry. (R. 309-310; Who's Who in America, Vol. 28, p. 195.)

[12]The lensometer is the most accurate instrument for the measurement of the power of lenses (R. 259).

well as from those cases in which a customer's existing frames may have been broken (R. 165). Also, a significant number of persons desire more than one pair of glasses, in which case the dispensing optician sells both new frames and duplicate lenses which he has made from either the patient's prescription or his old lenses (R. 165). In either case the availability of new and varied types of materials and the increasing public desire for style, design and color in eyeglass frames, stimulates and constantly enhances this phase of the optician's business. The dispensing optician also does considerable repair work on eyeglasses having broken or bent temple pieces, nose pads, etc., and in maintaining them in proper adjustment (R. 277, 368). This service is rendered without charge by practically all opticians (R. 134).

In selling new frames or duplicate eyeglasses and in performing the repairs described above, the optician is required to fit and adjust the new frames or repaired eyeglasses to the face of his customer and, in so doing, the very same acts are required of him as those he performs in fitting and adjusting an original pair of eyeglasses formulated from the prescription of an ophthalmologist (R. 242).

Effect of Eyeglasses.

The testimony of Dr. Sheard and Drs. Benedict, Coston, Lemoine and Clay is that improper eyeglasses cannot cause any permanent damage to the structure of the eye. The human eye has a remarkable tolerance and while eyeglasses with improper lenses may in some cases cause mild discomfort akin to that produced by an ill-fitting pair of shoes, they will not cause any organic damage to the eyes (R. 92, 100, 104, 108, 234, 329, 378, 386-387, 446-447, 452-453). Thus Dr. Benedict said: "I think you would have a very difficult time in demonstrating that any person is

definitely damaged by being supplied with glasses that are not perfect correction of his refractive error" (R. 329). Because of the eye's large tolerance persons often wear with comfort eyeglasses containing lenses of quite different power from those indicated by the results of examination (R. 113, 330, 387). The aim of all practitioners in refraction is to obtain comfort and the best possible vision for their patients (R. 113). As Dr. Coston testified "* * * if the glasses are fitted improperly, and a number of times that will be true, because the patient subjectively didn't give you the proper answers, or maybe the doctor was a little careless that morning, but if he gets the glasses and he sees well, and he has no discomfort, suppose that a mistake had been made somewhere, it is of no importance. You fit the patient with glasses to make him see the best you can, with comfort. Now technically whether you've got it on this axis or that axis is of absolutely no importance, and you find people wearing the screwiest type of glasses, that when you get through examining them, your reading and your interpretation of what they need is exactly different to what they have worn, but they have been quite comfortable and they have seen well with what they have had.

"Now, you have two choices. You can let them wear what they have, or you can give them a new pair of glasses, and very often we let them wear what they have had, if financial matters enter into it. You can't say that the eye is like a piston in a cylinder, you don't have to fit it to that tolerance. Now, we are after comfort and the best vision and that's all" (R. 113).

Duplication of Eyeglasses.

The lenses contained in eyeglasses can be duplicated accurately and with complete safety to the wearer by the use of the lensometer (R. 109-113, 343, 371-373). Where,

for example, an extra pair of eyeglasses is desired, the sensible and economical thing to do is to have one's existing eyeglasses duplicated by an optician (R. 111, 322). A qualified optician can do that without a prescription by using a lensometer to determine the lens strength accurately—more accurately than could be done under a new examination requiring subjective answers — because the lensometer is a precisely accurate instrument (R. 111). Duplication of eyeglasses and lenses by such method is not detrimental to the wearer's eyes and eliminates what otherwise would be the needless expense of an additional examination by an ophthalmologist or optometrist (R. 111, 322). Whether the lenses in the glasses being duplicated may have rotated "off axis" is immaterial because if the lenses are off axis and the wearer is satisfied with them, he can have them duplicated and wear the duplicates without any harm being done. If the old glasses aren't satisfactory, the wearer will not have them duplicated (R. 113).

There is also nothing detrimental to the health or welfare of the wearer in duplicating a broken lens by means of the lensometer (R. 100, 385-387). Only in those cases where the fragment is too small for an optician to determine the axis of a cylinder or the powers of the various segments in the case of multifocal lenses is it impossible to duplicate accurately by the lensometer. In such cases competent opticians will not attempt to duplicate (R. 171, 323, 333-334, 386). But even if a duplication was attempted, it would not injure the wearer's eye (R. 386). Likewise, lenses may be taken out of one set of frames and inserted into other frames without any deleterious effects to the wearer.

Opticians' Relation to Ophthalmology.

The ophthalmologist ordinarily includes in his prescription only the power of lenses required to correct the re-

fractive error in the patient's eye (R. 92, 267, 339, 367). Practically all ophthalmologists leave the measurement of the interpupillary distance, the type and size of frame, the distance from the eye to the lens and the "tip" or panascopic angle of the lens in the completed eyeglasses to the optician (R. 92-93, 239-240, 276, 368). Without the optician to perform the above services, the ophthalmologist would be compelled to devote much of his time to the merchandising and craftsman functions of the optician, thereby neglecting many serious problems such as eye surgery and the treatment of pathological conditions in the eye which he alone in the field can treat (R. 97, 163-164, 379-380). The optician also performs a valuable service to the ophthalmologist and the public in his merchandising of eyeglass frames. In addition to relieving the ophthalmologist of this essentially mercantile duty, the optician serves the public by making it possible for the eyeglass wearer to obtain frames that will suit his taste and his visual needs (R. 93, 162-163, 368-370). This latter is quite important, for unless the patient likes his frames, he won't wear his glasses and thereby loses the benefit of the ophthalmologist's prescription (R. 369). All of the above acts are within the traditional field of endeavor of dispensing opticians (R. 132-133, 163).

The medical testimony is that prescriptions for fitting, adjusting and adapting frames are impossible or impractical to write (R. 101). The only way such fitting and adjusting can be accomplished is with the patient actually present so that the glasses may be "tried on" his face (R. 367-371, 373). In fact, prescriptions of ophthalmologists ordinarily include only the powers of the lenses desired (R. 94, 267, 304, 312-313, 339, 367; Pltfs.' Exhibits 20, 21; R. 479, 480, 129).

Ophthalmologists give their prescriptions to their patients and permit them to have them filled by opticians of

their own choosing (R. 91, 304, 382). In fact, it is considered improper for an ophthalmologist to specify a particular optician to fill his prescription and he should confine himself to recommendation, where requested by his patients, of several opticians (R. 305). However, if under House Bill No. 953, the ophthalmologist remains legally responsible, not only for his examination, but also for the eyeglasses dispensed, he will be compelled to direct his prescriptions to specific opticians (R. 100).

In order to better fulfill its traditional functions and serve the public, opticianry has inaugurated measures directed toward the establishment and promotion of educational standards and qualifications. To this end a board of opticianry has been established to accomplish these objectives through the establishment of adequate collegiate education and laboratory training (R. 311, 430-435). The first function of this board is to foster and support excellence in optical craftsmanship through adequate education and training. The second function is to certificate competent men now in practice and to certificate by examination graduates of schools (R. 434-435). As a result of these efforts two-year courses in opticianry have been established at Rochester College, Rochester, Minnesota, the Institute of Applied Arts and Sciences, University of the State of New York, and in Los Angeles City College, Los Angeles, California (R. 167-168, 431). All of the foregoing courses offer technical instruction in all fields of the optician's endeavor, including duplicating lenses, placing lenses in frames and fitting and adjusting lenses to the face (R. 432-434).

Advertising by Opticians.

By virtue of his merchandising function the optician ordinarily advertises his services and the goods he has for

sale by various advertising media (R. 146, 167, 211-212, 216, 377). In the opinion of Doctors Coston, Cordes, Braley and Lemoine truthful advertising by opticians is not detrimental to the public health and welfare (R. 109, 305, 365, 377).

Functions of the Optometrist.

The optometrist is a person trained in the measurement of the refractive errors of the human eye. In Oklahoma the practice of optometry is defined as

> "* * * The science and art of examining the human eye and the correcting or relief of ocular abnormalities by the employment of any means, including the use or furnishing of any self-testing device, other than the use of drugs, for the measurement of the powers of vision and the adaptation of lenses or prisms for the aid thereof" (59 Okla., St. Ann. §581).

In addition to measuring the refractive error in the human eye, practically all optometrists, unlike most ophthalmologists, sell the eyeglasses prescribed by them (R. 42, 133, 158, 252-253, 411).[13] Between sixty and seventy

[13]The combination in the optometrist of the statutory professional service of refracting eyes and the craftsman-mercantile functions of the optician has been recognized in state sales tax litigation. See *Rice* v. *Evatt*, 144 Ohio St. 483, 59 N. E. 2d 928-929; "The work of grinding lenses and of adjusting frames and fitting them to the face is not professional in character. All such work may be done by an optician. Though optometry is a limited statutory profession, the only professional service that the optometrist performs is 'the application of optical principles, through technical methods and devices in the examination of human eyes for the purpose of ascertaining departures from the normal measuring their functional powers and adapting optical accessories for the aid thereof.' * * * The furnishing of optical accessories by an optometrist to his patient for a consideration is not a professional act and is a sale as defined by statute. * * * There is no doubt that the transactions had a professional aspect in one of the phases and involved sales only for which no separate charges were made. The proportion which the cost of materials bore to the total charge (about one to three) does not indicate that sales were an inconsequential element. Nor were the sales merely incidental to professional services. In a transaction of that kind, sales and services are distinct. The vendee may get his prescription from an optometrist and his spectacles,

per cent of the corrective eyeglasses sold in the State of Oklahoma and the other states of the Union are sold by optometrists (R. 144, 166). Almost invariably optometrists in Oklahoma and elsewhere refuse to give their patients prescriptions for eyeglasses which may be filled by opticians of the patients' choosing but rather insist that they obtain the eyeglasses from the prescribing optometrist and let him fit and adjust those eyeglasses to the face (R. 133, 158, 253).[14] Such is one of the basic tenets of the profession of optometry (R. 259-260). As a direct consequence of this almost uniform practice, the business of the dispensing optician comes from ophthalmologists' prescriptions and members of the general public who desire either duplicate eyeglasses, replacement lenses, new frames or repairs to existing eyeglasses (R. 133, 158). As a corollary of this custom the major portion of the optometrists' net income —in some instances as high as 100 per cent[15]—is derived not from his services in refracting eyes but rather from the profits realized on the sale of the eyeglasses, frames and lenses dispensed after refraction (R. 134, 160). In all that he does except for refracting eyes and examining

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with lenses ground according to the prescription, from an optician. When the individual vendee gets both from an optometrist, in the same transaction, their distinct character persists and the furnishing or sale of each is a consequential element. Furnishing optical accessories for a consideration by the optometrist upon his own prescription is a professional transaction, only insofar as the prescription is concerned and therefore can never become professional to such an extent as to involve sales as inconsequential elements."; *Commonwealth* v. *Miller*, 337 Pa. 246, 11 A. 2d 141, 142-143; "There is no escape from the conclusion that appellant is liable for payment of the mercantile license tax on his business as a retail vendor. The sale of glasses properly belongs to the occupation of an optician and is not necessary to the practice of the profession of optometry"; compare, *Babcock* v. *Nudelman*, 367 Ill. 626, 12 N. E. 2d 635. But *cf. American Optical Company* v. *Nudelman*, 370 Ill. 627, 19 N. E. 2d 582. See also, brief of the American Optometric Association, *amicus curiae*, page 2.

[14] See also, brief of American Optometric Association as *amicus curiae*, p. 2.

[15] For example, in those cases where optometrists advertise "eyes examined free" (R. 160).

them for the existence of some pathological condition, the optometrist is in reality acting as an optician (R. 429).

In keeping with the predominant merchandising aspect of their practice, the majority of optometrists in Oklahoma have their offices in downtown or suburban retail business districts at ground floor levels. Such is also true of the rest of the United States (R. 134-135, 166-167, 254). Optometrists in Oklahoma and elsewhere almost uniformly make just one charge for their services and functions, i. e., refracting eyes and selling eyeglasses (R. 133-134). The average examination fee of Oklahoma optometrists where no glasses are prescribed is about $5. Yet the general "one amount" charge of Oklahoma optometrists for examination, eyeglasses, fitting and adjusting where the completed eyeglasses dispensed cost the optometrist approximately $8, is from $25 to $30 (R. 134).

While farsighted leaders in the field of optometry are today urging that optometrists forsake the commercial aspect of their practice by eliminating merchandising practices, the realization of this program remains for future development (R. 279-280, 410-412). In fact, the establishment of a purely professional practice envisaged by such leaders in optometry will result, if attained, in the opening of broader fields of service by opticians and consequently enhances the urgency of preserving this vocation as a separate qualified craft (R. 410-412; 429).

Rental of space.

The portion of Section 4 (59 Okla. St. Ann., §944) involved in No. 184 is that prohibiting any person, firm or corporation engaged in the business of retailing merchandise to the general public from renting space, subleasing departments or otherwise permitting any person purporting to do eye examination or visual care to occupy space

in such retail store. Plaintiff Oran Rips is an Oklahoma licensed physician (R. 199). He occupies office space on the balcony of the Zales Jewelry Store in Tulsa, Oklahoma, under a written lease from the Zales Jewelry Company, expiring March 31, 1956 (Pltffs.' Ex. 22; R. 14-15, 200). Under date of September 1, 1953, defendant Zales Jewelry Company notified Dr. Rips that his lease was being terminated effective September 4, 1953, because of House Bill No. 953 (Pltffs.' Ex. 23; R. 17-18, 200). Dr. Rips testified that the value of the lease to him was $25,000 (R. 200). The court below found that such portion of Section 4 was unconstitutional and, therefore, enjoined the defendant, Zales Jewelry Company, from canceling or terminating its lease to plaintiff Rips upon the ground that it was in violation of Section 4 of House Bill No. 953 (R. 28-29).

Effects of House Bill No. 953.

The undisputed record evidence clearly establishes that optometrists in Oklahoma and elsewhere are in direct competition with opticians in the sale of eyeglasses, frames and lenses, and because of their economic dependence upon the sale of those articles, the merchandising interests of the optometrist play a dominant part in the establishment of their professional objectives and activities. House Bill No. 953 has the following effects on all Oklahoma opticians:

1. It prevents them from fitting, adjusting or adapting or in any manner applying lenses, frames, prisms or other optical appliances to the faces of persons without a prescription on file from an Oklahoma optometrist or ophthalmologist. Thus, unless a prescription is on file, opticians are prevented from:

(a) inserting a customer's old lenses into a new frame;

(b) making duplicate eyeglasses or replacement lenses, and

(c) selling new frames for existing or replacement lenses;

2. It prohibits them from advertising by any means whatsoever their calling, merchandise and services;

3. It prohibits them from filling or duplicating prescriptions of out-of-state ophthalmologists, and

4. It subjects them to the criminal sanctions and in addition, the injunctive provisions of Section 6 upon the filing of a verified complaint with a county attorney.[16]

As a direct and natural consequence of the above prohibitions and the fact that between 60 per cent and 70 per cent of the prescription eyeglasses sold in the nation are sold by optometrists who will not issue prescriptions opticians will be deprived of a major part of their lawful calling including at least 50 per cent of their business in

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[16]As the court below found "' ' ' plaintiffs' allegations, together with the undisputed proof, indicate that immediate and unrelenting enforcement of all the provisions of this Act, provisions clear in meaning and intent, by the defendant State officers, is imminent; in fact, defendants' counterclaim in this suit specifically demands injunctive relief against the plaintiffs as authorized by Section 6 of the instant Act. The inevitable result of the enforcement of the provisions found by this Court unconstitutional in points I and II of the Opinion, as applied to the two dispensing optician plantiffs, will be to literally put said plaintiffs out of business; unquestionably, from such an injury there can be no adequate remedy at law and that such will result is not conjectural but positive. The effect of the enforcement of the Act on the unconstitutional feature discussed in point III of the Opinion, as applied to plaintiff, Dr. Rips, although not resulting in putting Dr. Rips clear out of business, will be to compel said plaintiff to relinquish a very desirable and valuable lease and to move to another place of business. Insofar as all plaintiffs are concerned no adequate remedy is available; the State cannot be held responsible for the business loss of the two dispensing optician plaintiffs or the loss of a lease by plaintiff Rips, valued at more than $5000; and, certainly a lessor cannot be held responsible for cancelling a lease in conformity with a state criminal law requirement (notice of cancellation of which has already been given).

"' ' ' What facts could more pointedly justify the exercise of equitable authority than these—where the plaintiffs are faced with both an injunctive prohibition and a liability for multiple criminal prosecutions. ' ' '" (R. 61-63). *Toomer* v. *Witsell*, 334 U. S. 385, 391-392; *Russo* v. *Reed*, 93 F. Supp. 554, 558 (S. D. Me., 1950); *cf. Terrace* v. *Thompson*, 263 U. S. 197, 214.

the sale of frames which, in turn, represents approximately 70 per cent of the average optician's total business (R. 196-198, 206), and by far the greatest part of the optician's lost business will fall to optometrists who in filling that business will be acting as opticians (R. 45). It would "break" most dispensing opticians if they could not sell frames, replacement lenses and duplicate eyeglasses without prescription because such represents forty to fifty per cent of their business (R. 166).

Another direct effect of the prohibitions will be an ever increasing hampering of the ophthalmologist in his practice by reason of the elimination from business of many qualified opticians—the ophthalmologists' "right arm"—thus resulting in the ophthalmologist being able to examine fewer people and the diversion of more and more people with eye defects from ophthalmologists to the optometrists, the latter being neither authorized nor trained to treat pathological conditions of the eye or to perform eye surgery. Yet another effect will be the withdrawal from the public of all forms of legitimate advertising by which it is enabled to know who sells eyeglasses, frames and lenses and who may fill its prescriptions with the result that the optician is impeded in his ability to secure business which will otherwise, purely by the operation of statistical percentages, fall to the optometrist; and the public will be deprived of all means of knowledge respecting the cost and kinds of optical goods which are available to it.

The Act also prohibits Oklahoma opticians from filling prescriptions for eyeglasses written by ophthalmologists or optometrists residing in other states of the Union. This, according to Dr. Coston, is also not in the best interests of the public (R. 101).

SUMMARY OF ARGUMENT.

Plaintiffs contend that the court below did not err in holding that portions of Sections 2, 3 and 4 of Oklahoma House Bill No. 953 (59 Okla. St. Ann., §§942-944) were void under the Federal Constitution and the XIV Amendment thereto. They also contend that those portions of Section 3 prohibiting the advertising of eyeglasses, lenses and prisms are unconstitutional and that the court below erred in failing to so hold.

I.

The district court properly held that Section 2 violated the "due process" and "equal protection" clauses of the XIV Amendment in prohibiting dispensing opticians from (a) fitting, adjusting, adapting or in any manner applying lenses, frames, prisms or other optical appliances *to the face* of a person, and (b) duplicating or attempting to duplicate, or placing or replacing into frames, lenses or other optical appliances that have been prescribed, fitted or adjusted for visual correction except upon the written prescriptive authority of Oklahoma licensed ophthalmologists or optometrists. The optician is fully competent to perform these functions which he has customarily rendered for hundreds of years. Such functions are those of a skilled craftsman or artisan, do not rise to the plane of professional endeavor, and do not require the education or training similar to that required of the ophthalmologist or optometrist. The prohibition of Section 2 has no real, substantial relation to the public health, morals or welfare because the ophthalmologist is less skilled and able, and the optometrist no more skilled, than the optician in the performance of these services. Even if

it be assumed that an optician could make an error in fitting or adjusting eyeglasses to the face or in duplicating lenses, no harm or injury would result to the eyeglass wearer. Moreover, the optician is a most important auxiliary to the present day ophthalmologist and relieves the latter of skilled craftsman and mercantile functions for which the ophthalmologist, in the proper practice of his profession, has neither the time nor training. The practice of ophthalmology requires the optician for only by the optician's complementing with his skilled craftsman and mercantile functions the ophthalmologist's professional knowledge, skill and training, can complete visual care be given the public.

The direct effect of Section 2 is to transfer from the optician to the optometrist a large and profitable portion of the former's business and to such an extent that the optician will cease to exist. Section 2 contains no regulations or standards for opticians but rather is a discriminatory statute that arbitrarily takes from the optician a major portion of his lawful business.

Roschen v. *Ward,* 279 U. S. 337, is not determinative of this case because (1) it was there admitted that a regulation of the sale of eyeglasses, insofar as it might require an examination and fitting of the eyes of the purchaser, was within the state's police power; (2) the merit of professional examination of the eyes at the time of the sale of original eyeglasses is not an issue here, and (3) the "constitutional facts" as established in this case by the uncontradictable testimony of some of the nation's foremost ophthalmologists that the fitting, adjusting and adapting of eyeglasses and frames to the face, and the duplicating of lenses or complete eyeglasses by opticians is not harmful or detrimental to the public health and welfare were not present in *Roschen* v. *Ward.*

Section 2 is also an unconstitutional delegation to ophthalmologists and optometrists of the right to determine who shall do business as a dispensing optician in the State of Oklahoma. No standards or qualifications for opticians are included, and the effect of the statute is to give ophthalmologists and optometrists unbridled discretion to determine the number of and persons who may engage in business as opticians. The inevitable result, therefore, is that such authority may be exercised arbitrarily, capriciously and without uniformity. On the other hand, if Oklahoma considers it desirable to establish standards for and to regulate the practice of opticianry, it may lawfully do so by direct legislation that will not have the effect of taking away the optician's business and giving it to the optometrist or of delegating to private individuals the power to determine who may act as opticians.

By its exemption of the sale of ready-made glasses containing convexspherical lenses[11] from the operation of the Act, the Oklahoma Legislature has denied opticians the equal protection of the laws guaranteed them by the XIV Amendment. There is, in fact, no real difference so far as the public health and welfare are concerned, between the fitting, adjusting and adapting to the face or the duplication of eyeglasses containing all types of lenses and the over-the-counter sale of ready-made eyeglasses containing only convexspherical lenses.

II.

The court below correctly held that the prohibition of Section 3 against advertising the sale of frames, mountings and other optical appliances is unconstitutional, but erred in upholding that prohibition with respect to com-

[11]Convexspherical lenses are only magnifying lenses (R. 81, 100-101, 193).

pleted eyeglasses, lenses and prisms. The right to truthfully advertise merchandise and craftsman services is a property right protected by law, and a state may not, under the guise of a police power measure, arbitrarily interfere with a lawful calling or impose unreasonable and unnecessary restrictions upon it. Section 3 is not a statute imposing reasonable regulations upon the right to advertise eyeglasses, frames and lenses, but rather is a complete prohibition of all advertising of those articles of merchandise by every media and by all persons. In so doing the statute violates due process and unreasonably burdens and restrains interstate commerce contrary to Article I, Section 8, of the Federal Constitution.

The advertising prohibition of Section 3 also violates the "equal protection" clause of the XIV Amendment because it does not apply to the sale of ready-made eyeglasses and in addition, Section 736.1, 59 Okla. St. Ann. permits the advertising of other similar prosthetic devices such as hearing aids and trusses.

III.

The court below did not err in holding unconstitutional that portion of Section 4 prohibiting any person, firm or corporation engaged in retailing merchandise from renting space in a retail store to a person purporting to do eye examination or visual care. Such provision has no relation to the manner in which an ophthalmologist or optometrist will perform his professional duties and, therefore, does not promote the public health or welfare. The measure cannot be sustained upon the ground that it prevents "corporate practice" because such practice is already forbidden in Oklahoma by statutes that can be enforced effectively by the officers of that state. It is not reasonable or necessary to outlaw perfectly valid legal

ationships merely on the suspicion that a third party's fit motive may influence an opeometrist or ophthalologist having his office in a retail store in the discharge his professional duties. As long as the State of Oklama permits optometry to retain its mercantile functions, strictions against the location of an ophthalmologist's optometrist's office will not eliminate or minimize ommercial" considerations in the prescription of eyeasses. The measure is an unwarranted restriction upon e use of private property and also impairs the obligan of existing lease contracts contrary to Article I, Secn 10, of the Federal Constitution.

IV.

The court below erred in excluding plaintiffs' offered xhibit 2 (R. 459, 220, 265) because that exhibit was comtent, material and relevant to show the conditions and ecial facts existing at and before the enactment of ouse Bill No. 953.

ARGUMENT.

I.

Section 2 of House Bill No. 953 is unconstitutional because it deprives plaintiffs and persons similarly situated of the right to conduct essential functions of a recognized vocation in violation of the XIV Amendment to the Constitution of the United States.

A. Section 2 deprives plaintiffs and persons similiarly situated of the right independently to perform recognized functions of their craft when such deprivation has no reasonable relation to the public health and welfare of the people of the State of Oklahoma.

The court below unanimously[18] found that those portions of Section 2 that prohibit anyone not an Oklahoma licensed ophthalmologist or optometrist from fitting and adjusting lenses, frames, prisms or other optical appliances to the face of a person, duplicating lenses and complete eyeglasses, and from placing or replacing lenses into eyeglass frames except upon the written prescription (or its duplicate) of an Oklahoma ophthalmologist or optometrist violated the "due process" and "equal protection" clauses of the Constitution of the United States (R. 44-53; 62-64;

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[18]Judge Murrah had no misgivings as to the unconstitutionality of Section 2. In his separate opinion he said:

> "The obvious result of this legislation is to appropriate a property right of one class to follow a legitimate calling or occupation and to give it to another class not shown to be more competent in the public interest. Indeed, the evidence shows that it would be inimical to the public interest to require the wearer of eye glasses to return to the ophthalmologist in order to obtain a prescription for the replacement or duplication of an eye glass, or to place the burden upon the ophthalmologist of merchandising frames and mountings and other appliances, or placing that purely commercial monopoly in the optometrist. There is no rational basis for depriving the optician of the right to perform this purely mechanical and commercial service to the public.
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> . . . . . .
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> "* * * As to Section 2, while I have some misgivings about injunctive relief, I am clear on the issue of constitutionality" (R. 63-64, 68).

68). It found from uncontradicted evidence that the optician was fully competent—in fact, more competent than the ophthalmologist and, at least equally as competent as the optometrist—to perform those functions (R. 47, 48, 63-64). Yet under Section 2, the optician would be deprived of the right to perform those lawful functions and that right would be, by the inevitable operation of economic facts, transferred to optometrists (R. 49, 63).

The principles of constitutional law applicable to this case are clear and undisputed. The real controversy is whether the "constitutional facts" established in the record and found by the district court bring the case under the line of authority typified by *Daniel* v. *Family Security Life Insurance Co.*, 336 U. S. 220, or that represented by *Liggett Company* v. *Baldridge*, 278 U. S. 105. Whatever may be the status of the precise language and holding in the *Liggett* case after this Court's decision in *Lincoln Federal Labor Union* v. *Northwestern I & M Co.*, 335 U. S. 525, and the *Daniel* case,[19] there can be no question but that the Federal Constitution limits the power of a state acting under the guise of an exercise of the police power to deprive a whole craft of its right to work and to confiscate that craft's business for the benefit of others when, in fact, such action bears no reasonable relation to the public health and welfare. The issue in this case is not one of basic constitutional principles, but rather the issue is to determine within which of acknowledged constitutional principles the present factual situation falls. This issue cannot be resolved by an abstract consideration and discussion *in vacuo* of the constitutional principles announced in the *Lincoln Federal* and *Daniel* cases or in *Roschen* v. *Ward*, 279 U. S. 337. Judicial precedents establish principles, but they do not establish facts.

[19] See, Brief for American Optometric Association, Inc., as *amicus curiae*, pp. 10-14.

The issue here can be determined only by coming squarely to grips with the evidence before the Court upon the factual question[20] of whether the statute involved actually bears any reasonable relation to the promotion of the health and welfare of the people of Oklahoma. If it does, the statute is constitutional; if it does not, then plaintiffs are being deprived of their right to pursue a lawful calling in violation of the "due process" clause of the Federal Constitution.

The court below forthrightly met this factual issue and on the basis of uncontradicted evidence found that no interest of the public was served by limiting the traditional scope of the work of dispensing opticians by legislation which had the effect of transferring their work to persons less qualified to do that work, and whose qualifications and training in eye examinations and eye treatment had no relation in fact to the craftsman-like performance of the dispensing optician's artisan and merchandising functions. If the court below did not dwell at length upon judicial precedent, it was only because no such precedent could substitute in the task before it for the extensive and convincing medical and technical evidence upon which it was justified, and required, to place its reliance.

The medical evidence in this case comes from preeminent ophthalmologists—the foremost in the country—and is uncontradicted and unimpeachable. Their testimony establishes that the optician is fully competent to perform his customary functions in a manner entirely consistent with and in the best interest of the health and welfare of the public.

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[20] See *Borden's Farm Products* v. *Baldwin*, 293 U. S. 194; *Hammond* v. *Scheppi Bus Lines*, 275 U. S. 164; *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543.

In urging that the court below erred in striking down Section 2, defendants[21] rely primarily on *Kresge* v. *Ottinger*, 29 F. 2d 762 (S. D. N. Y., 1928), and the decision of this Court affirming, *sub nomine Roschen* v. *Ward*, 279 U. S. 337; *Commonwealth* v. *Kresge Co.*, 267 Mass. 145, 166 N. E. 558; *Sage-Allen Co.* v. *Wheeler*, 119 Conn. 667, 179 Atl. 195; *Ritholz* v. *Commonwealth*, 184 Va. 339, 35 S. E. 2d 210, and *City of Springfield* v. *Hurst*, 144 Ohio. St. 49, 56 N. E. 2d 185. Those cases are not determinative of the issues here for they fall within one of two classes, i.e., cases upholding the regulation of over-the-counter sales of ready-made glasses or cases dealing with some phase of the advertising of eyeglasses.

All of the above cases apparently rely heavily for their result on the opinion in *Kresge* v. *Ottinger* and on Mr. Justice Holmes' opinion in the appeal of that case. Since the subsequent authorities and defendants rely so much upon the opinion in *Roschen* v. *Ward*, it is appropriate to ascertain precisely what was decided in that case. In the district court opinion written by Judge Augustus N. Hand, the court refused to enjoin the enforcement against the Kresge stores of a New York statute that prohibited the sale of eyeglasses, spectacles and lenses for the correction of vision unless a duly licensed physician or optometrist was in charge of and in personal attendance at the booth or counter where such articles were sold. The statute expressly excepted from its application eyeglasses sold by licensed physicians or optometrists, the sale of goggles containing plano lenses, opticians selling eyeglasses on prescription, and *also the duplication of broken glasses*. The only issue before the court in the *Roschen* case was the application of the statute to over-the-counter

[21] As does the American Optometric Association in its *amicus curiae* brief.

sales of ready-to-wear glasses by such concerns as the Kresge stores.

Though evidence was submitted to the court disclosing the refractive principles applied in eye examinations which were likely to produce a more accurate correction of the patient's eye defect than self selection, it is clear from the opinion of the district court that there was no evidence before the court of the effect upon the wearer of an error either in his selection of ready-to-wear eyeglasses or in the filling of a prescription for eyeglasses containing other than convexspherical lenses. In fact, at the argument of the case it was conceded (29 F. 2d 765) that a statute regulating the sale of eyeglasses so as to require examination and fitting of the eyes of purchasers of spectacles, was a proper sphere for exercise of the police power. The objection made to the New York statute was not that the state had no authority to prohibit sale without examination, *but rather that the regulation attempted was invalid because it did not require the optometrist placed in charge of the sales location to examine or prescribe, and that, therefore, the measure afforded no protection to the public.* It was on this latter ground that Judge Hand upheld the statutory regulation upon the admission of the parties that the sale of eyeglasses could validly be regulated under the police power.

Furthermore, in evaluating the decisions in the *Roschen* case, it must always be borne in mind that what was there being considered was, as stated by Judge Hand (p. 764) "• • • the existing evils of haphazard selection of eyeglasses • • •" in over-the-counter sales of ready-made eyeglasses, and the decision only sustained the constitutionality of a requirement of professional attendance at counters of firms selling ready-made eyeglasses. The constitutionality of applying such a requirement to a dispensing optician handling or duplicating prescription eye-

glasses was not before the court or in the court's mind. In fact, as Justice Hand stated, p. 764:

> "* * * If the effect of the new requirement should finally be to render the sale of a standardized product unprofitable so that the customers in the end would not purchase it but would have their eyes carefully tested and their glasses made according to special prescriptions it cannot be said that the result might not on the whole be desirable * * *."

It is obviously a very different question to require, in effect, that people who already have obtained the special prescriptions which Judge Hand found desirable must, against their wishes and needs and against common sense, again obtain that prescription before obtaining duplicate eyeglasses or lenses. Further, it is a very different thing to require people who have already obtained such special prescriptions for lenses to obtain a duplicate copy of such prescription before they may purchase a new frame when in the first instance the frame is neither specified by nor the subject dealt with in the prescription. Finally, it clearly does not follow that the same constitutional considerations germane to the regulation of customers' selection of their own eyeglasses at a dime store counter control restrictions upon the trained and skilled services performed by the dispensing optician. It is apparent that the opinions in the *Roschen* case, both in the lower court and in this Court, go no further than to hold that, *where it is conceded by the parties that a regulation requiring examination and fitting of eyes of purchasers of spectacles at the time of the sale of original eyeglasses is a proper exercise of the police power*, a state statute requiring that an optometrist be present at the place of sale is not invalid as to vendors of ready-made eyeglasses for the reason that it does not also require him to make an examination.

The limited holding of the *Roschen* case was apparently extended, however, in *Commonwealth* v. *Kresge Co.*, *supra*, in which the Kresge Company was indicted under a Massachusetts statute for allegedly unlawfully practicing optometry. Again, as in the *Roschen* case, the question before the court was the constitutionality of regulating (actually prohibiting) the sale of ready-to-wear eyeglasses and the court stated, p. 560:

> "It seems to us not open to serious debate that it is within legislative competence to determine that scientific and trained adjustment of eyeglasses and of the lenses of which they are made, to the particular organs of vision of each individual, will be likely to effect a more complete and healthful correction of poor eyesight than the untrained and unaided selection by the customer himself from a mass of eyeglasses. * * *"

Clearly the court was addressing itself solely to the comparative benefits of professional prescription as against customer selection—the advantages of the trained over the untrained. Accordingly, the philosophy of the court is entirely inapplicable to the constitutionality of substantial restrictions upon the dispensing activities of opticians who, under the evidence in this case, are shown to be of equal, if not greater, competence and skill in their task than the optometrist or ophthalmologist. Furthermore, it is not clear from the statute, or from the opinion of the court, whether the regulation involved was applicable to the duplication of prescription eyeglasses or lenses. But the statement of the court, that it was dealing with a statute regulating "the untrained, unscientific *treatment* of the eyes" indicates that the court was of the opinion that the statute was directed solely to the benefits of prescription eyeglasses over ready-made eyeglasses

Obviously such broad holdings have little relation to the rather refined issues between skilled branches of the field of eye care presented by this case.

The cases of *Ritholz* v. *Commonwealth*, 184 Va. 339, 35 S. E. 2d 210, and *City of Springfield* v. *Hurst*, 144 Ohio St. 49, 56 N. E. 2d 185, cited by defendants (pp. 28, 30), merely set forth the proposition that there is sufficient relationship between the sale of eyeglasses and the public health and welfare to warrant a police measure regulating certain specific types of advertising. To the extent that the court in the *Hurst* case relied upon the *Roschen* and *Commonwealth* v. *Kresge Co.* cases for the proposition that a state may regulate "if not prohibit altogether" the sale of eyeglasses by a retail vendor, the court clearly was referring only to the holdings of those cases with respect to sales of ready-made glasses. Nothing in the language or theory of either of these cases bears upon the constitutionality of restricting the traditional functions of a dispensing optician dealing only with prescription eyeglasses.

Defendants contend in their brief (pp. 31, 33) that the decision of the Oklahoma Legislature that a dispensing optician must have a prescription in his shop before duplicating eyeglasses or lenses or replacing frames does not affect "the ethical optician" but only "the commercial optician." Certainly such statement is flatly contradicted by all of the evidence in this record.[22] The uncontradicted testimony of Mr. Hill and Mr. Barber, a member and a national officer, respectively, of the Guild of Prescription Opticians, which under no stretch of the imagination may be termed an association of unethical or commercial opticians, is flatly to the contrary (R. 144-145, 166).

[22] See, for example, the intervening petition of the Oklahoma Dispensing Opticians Association included in the supplemental transcript filed with the clerk of this Court, but not designated for printing.

Defendants have assembled in their brief eleven statements of purported merit to the requirement that a prescription be on file with the optician before he duplicates eyeglasses or lenses or replaces frames. Probably the best answer to this accumulation of isolated bits of medical trivia credulously gleaned from the expert evidence is that furnished by Dr. Coston in response to defendants' questions regarding Item 4 of this list:

> "I don't assume anything about it. If he is satisfied with the glasses, he has them duplicated. If he isn't, he isn't going to have them duplicated. If it's off axis and it's causing him no symptoms, he doesn't know it's off axis, he can have them duplicated and wear them and there is no harm done.
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> • • • • • • •
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> "It would not be according to my prescription, no. * * * I think that sometimes we get mixed up in technical things too much. The aim of a proper refraction is first of all to have the best vision that the glasses will give the patient, plus comfort. Now if the glasses are fitted improperly, and a number of times that will be true, because the patient subjectively didn't give you the proper answers, or maybe the doctor was a little careless that morning, but if he gets the glasses and he sees well, and he has no discomfort, suppose that a mistake had been made somewhere, it is of no importance * * *" (R. 113).

When the eleven "reasons" are analyzed, it appears that actually 3 and 9 are duplicates and that 3, 4, 5, 6, 8, 9 and 10 all resolve themselves into the same basic proposition --that an error could conceivably be made in duplication of a lens by a lensometer. Notwithstanding that possibility, the medical testimony shows that no harm could result. Moreover, the fact that an error could conceivably be made is not an "evil" peculiar to opticians, but rather a frailty to which all mankind is subject. In fact, the evidence estab-

ishes that such an error is far less likely to occur in luplication or fitting and adjusting by an optician because ıe is more competent to do that work than the ophthalnologist and equally as competent, if not more so, than he optometrist. Furthermore, the testimony is that in hose cases where a patient returns to the ophthalmologist, he conformity of the lens dispensed with the lens preeribed is usually determined by the doctor's technician or nurse by the use of the lensometer (R. 96, 240, 243).

Considering separately each of the eleven "reasons," he following appears:

Reason 1. The record references fail to support the assertion that the eye-lens distance and angle of the lens o the eye cannot be ascertained by the optician from the glasses alone. The eye-lens distance can be measured with he micrometer-like instrument demonstrated by Mr. Hill t record page 122. Furthermore, the data concerning the ye-lens distance included in the ophthalmologist's preeription is that between the patient's eye and the lens n the trial case used at the time of examination (R. 92, 37). This information is not intended to prescribe the eyeens distance in the completed eyeglasses, but rather is a eference point from which the optician can compute, by tandard mathematical tables, the power of the lenses reuired in the completed eyeglasses when the eye-lens istance is different from that at which the examination as made. If the optician can't place the lens in the completed eyeglasses at the examination distance, which freuently is the case, he compensates for such variation in istance by computing the power of the lenses to be used the different distance to give an equivalent correction R. 92, 237). Equally significant is the testimony of Dr. emoine that the eye to lens distance for completed eyelasses cannot be stated in the prescription but rather can

only be determined after the frame is selected and tried on the patient's face (R. 384).

Reason 2. Dr. Braley's testimony at page 339 is the sole support for this alleged valid "reason" for prohibiting duplication in the interests of the public welfare. It utterly fails to support the conclusion drawn by the defendants. Instead, Dr. Braley testified that the ophthalmologist's prescription contained only the type or power of lens required except occasionally when the type of frame or glass might be included as, for example, in a post-operative cataract prescription where certain different kinds of glass might fill the prescription better (R. 339). He went on to state "that doesn't necessarily mean that the patient will order those or want to buy that particular kind of glass" (R. 339).

Reason 3. Admittedly, there is the *possibility* of human error in lensometer duplication, but as pointed out before (page 37), there is less likelihood of that error when the duplication is done by the optician because he is the most competent person in the field to perform duplications. It is equally obvious that duplication from a prescription is no absolute guarantee against error.[23] In fact, Dr. Coston testified that in duplication by a lensometer, an optician can duplicate more accurately than could be done under a new examination because the results of the examination depend in part on subjective answers (R. 111). Duplications by a lensometer alone result in lenses within the accepted limits of tolerance (R. 111).

Reasons 4 and 5. Essentially the same reply as in 3 above is applicable here. In addition, it should be remembered that duplication in such circumstances would give the wearer exactly the same glasses he had been using comfortably and satisfactorily before.

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[23]For example, a mistake in reading the ophthalomologist's handwriting like that described by Dr. Lemoine may occur (R. 383).

Reason 6. The uncontradicted testimony is that opticians do not and will not duplicate from an insufficient fragment (R. 142, 171, 348). Of course, if one desires to conjecture, duplication from an insufficient fragment *might* result in a lens of different characteristics than the original, but even then wearing such a lens would not harm the patient (R. 108, 378). Furthermore, there is nothing in the ordinary prescription about *adapting* eyeglasses to the face. If the State desires further assurance against malpractice by opticians as to this point, it may certainly regulate their activities and prohibit improper duplication from inadequate fragments by appropriate legislation.

Reason 7. The record citation here does not support the conclusion asserted. Patently, a prescription would indicate the date the examination was made, but that wouldn't necessarily be the *last* examination the patient had undergone. Moreover, Section 2 does not require an eye examination at stated intervals[24] or at any time for that matter, and under its terms duplications could be made from a single prescription in the optician's file for the lifetime of the wearer, if the wearer so chose. It is difficult to see, therefore, how this purported reason has any relation to the public health.

Reason 8. True, the lensometer, as any other precision instrument, *can conceivably* get out of adjustment, but for that matter, so can the optometrist's phoropter. However, as pointed out by Mr. Barber (R. 170), lensometers don't get out of adjustment unless they are seriously abused or damaged. And the fact remains, that the lensometer is admittedly the most accurate instrument made for checking the powers of lenses (R. 259).

[24]Dr. Lemoine stated that the need for the frequency of eye examination varies with the patient and with age. From age seven to forty-five, ten years between examinations is all right (R. 387).

Reason 9. This is a complete reiteration of "Reason 2" and simply states the same obvious thing in another manner.

Reason 10. Conceivably, repeated duplications, each within accepted tolerances, could result ultimately, by cumulating tolerances in one direction, in a lens differing from that originally prescribed but this "reason" is speculation of the rankest order. As Dr. Coston answered a question framed substantially in the same language as Reason 10:

> "It's conceivable, but if you want to speculate, the error might be one way or the other, and if he's fool enough to go twenty-five years buying glasses that way, all right, but it won't do him any harm" (R. 106).

Reason 11. While under some circumstances it may be preferable to have duplications made from a prescription, yet on the other hand, the informed medical testimony in this case is that duplication by a lensometer from glasses alone is the customary, accepted practice among ophthalmologists and opticians, and that it is in no way detrimental to the welfare of the eyeglass-wearing public and, in fact, is the sensible thing to do when a prescription is not available (R. 110-112, 386).

It is patent from the above analysis that the defendants' "eleven points"[25] amount to nothing more than an overrefined dissection of fragments of the medical testimony. Furthermore, they completely overlook the unanimous conclusion reached by the medical witnesses that qualified dispensing opticians are equally as competent, if not more competent, than optometrists or ophthalmologists to do all the things which this statute seeks to restrict their

[25]These same "points" appear in the *amici curiae* briefs of Kansas (pp. 23-24) and Arkansas (pp. 11-13).

doing and that all such functions are, in the opinion of such experts, a proper field for the dispensing optician.

The statement on page 29 of the American Optometric Association's brief that seventeen states have enacted legislation which specifically prohibits the duplication of ophthalmic lenses without a prescription from a licensed optometrist or ophthalmologist is inaccurate. For example, the North Carolina statute cited in the supporting footnote was held unconstitutional in *Palmer* v. *Smith*, 229 N. C. 612, 51 S. E. 2d 8, for its attempt to make the replacement or duplication of a lens or frame by an optician the practice of optometry. Five of the other state statutes cited—Maine, Montana, Nevada, Tennessee and Virginia—contain an exception providing in substance that nothing in those acts shall be construed to prevent an "optical mechanic" from performing the mechanical work of replacement or duplication of such ophthalmic lenses. In so far as the remaining state statutes cited in that footnote are concerned, it is submitted that they are unconstitutional for the same reasons as the North Carolina statute was held to be in the *Palmer* case.

In the very next sentence of its brief the American Optometric Association states that "twelve other states include in their definition of the profession of optometry the adapting, fitting, adjusting, applying or employment of frames, mountings or other optical appliances to correct errors of vision, and provide that this cannot be done by one not a licensed optometrist, except on prescription." Of the twelve states cited in the footnote, seven—California, Idaho, Louisiana, Maine, Oregon, Tennessee and Utah—are the same states referred to in the preceding sentence and footnote. Moreover, making the fitting, adjusting, adapting and applying of frames, mountings or other optical appliances to the face the *practice of op-*

tometry is precisely similar to what was attempted with respect to replacement and duplication by the North Carolina statute stricken down in the *Palmer* case. The mere fact that states have enacted the statutes cited in footnotes 13 and 14 and that they would fall under the decision of the court below is no valid reason for the American Optometric Association to urge, as it does, that the court below erred.

It is respectfully submitted that the entire record establishes without qualification that there just is no real, substantial relation between the prohibitions of Section 2 and the public health and welfare. That being true, Section 2 is in direct violation of the XIV Amendment to the Federal Constitution.

The basic underlying principles controlling this case were present in *Scully* v. *Hallihan*, 365 Ill. 185, 6 N. E. 2d 176, in which an injunction was sought by certain "drain layers" against the enforcement of the Illinois Plumbing Act of 1935. At the trial it was shown that the occupation of drain laying consisted of laying tile and other metallic piping for sanitary drainage systems. Until 1935 there had been a well-recognized distinction between plumbing and drain laying, but the Illinois Statute enacted in that year defined plumbing so as to include the work of drain laying and set up requirements for the licensing of plumbers that called for certain educational qualifications. In effect, the statute was an attempt by the Illinois Legislature to take from drain layers their right to engage in their traditional vocation and give that right exclusively to the plumbers. In holding the statute unconstitutional, the Supreme Court of Illinois said, pages 179-180:

> "It is one of the fundamentals of our democratic form of government that every citizen has the inalienable right to follow any legitimate trade, occupation,

or business which he sees fit. His labor is his property, entitled to the full and equal protection of the law under the due process clause of the Federal Constitution. It is also embraced within the constitutional provision guaranteeing to everyone liberty and the pursuit of happiness. *Allgeyer* v. *Louisiana*, 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 832. This right to pursue any trade or calling is subordinate to the right of the state to limit such freedom of action by statutory regulation where the public health, safety, or welfare of society may require. *Nebbia* v. *New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469. However, in those instances where the police power is invoked to regulate and supervise a legitimate occupation the restraint imposed must be reasonable. *The determination by the General Assembly that such regulations upon a trade are needful is not conclusive and is always subject to review. In order for such regulations to be lawfully imposed upon the constitutional rights of the citizen to pursue his trade or business, the act passed under the guise of a measure to protect the public health, comfort, or welfare must have a definite relation to the ends sought to be attained. Banghart* v. *Walsh*, 339 Ill. 132, 171 N. E .154.

"* * * The trade of a drain-layer is an independent trade, not requiring the scientific knowledge necessary to plan, devise, and install either a sewage, water or ventilating system in public buildings, nor that the laborer be educated in sanitary engineering. His is not the function of a sanitary engineer. *No citizen should be legislated out of his trade and have it awarded to another craft under the garb of a health measure where it is not definitely related to such measure.* This phase of the act of 1935 cannot be supported as a police power dealing with the health, welfare, safety, or comfort of the public. * * *" (Emphasis added.)

Here the vocation of an optician is an independent calling as was the trade of a drain layer in the *Scully* case. The optician does not require the scientific knowledge necessary to refract eyes and examine them for pathological conditions that is required of the ophthalmologist or the optometrist, nor is the optician educated in such matters because he does not undertake to do those things. Except for the conflict in the merchandising functions of both optician and optometrist, the optician does not have the functions of an optometrist. In fact, the optometrist is acting as an optician in all that he does except refraction and examination for pathological conditions. Consequently, the optician should not be legislated out of his calling and have it awarded to the optometrist under the garb of a health measure where the public health is not definitely related to such measure.

Similarly, *Banghart* v. *Walsh*, 339 Ill. 132, 171 N. E. 154, involved an Illinois statute that amended a previous statute regulating the business of barbers so as to require beauty shop operators to qualify as barbers before they could cut or trim hair. The plaintiffs had been engaged for a number of years previously as beauty shop operators in the course of which business they cut women's hair. Here again the effect of the new statute was to take from the beauty culturists the right to cut women's hair and transfer that business to barbers. In holding the act unconstitutional in so far as it applied to the beauty culturists, the court said, pp. 156-157:

> "* * * When the police power is exerted to regulate the conduct of a useful business or occupation, the legislature is not the sole judge of what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling and exercise his own judgment as to the manner of conducting it, but the measures adopted to protect the public health

and secure the public safety and welfare must have some relation to these proposed ends. *Ritchie* v. *People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315. For the same reasons that the barbers' law was held to be constitutional the occupation of beauty shop operators and beauty culturists may be the subject of regulation. Their occupation brings them in contact with the persons of their patrons, and their careless and unsanitary use and application of cosmetic preparations by means of devices, apparatus, or appliances, or bleaching, coloring, dyeing, or otherwise treating the hair, may injure their patrons or induce disease.* * *

* * * * * * *

"From Section 2 of the Beauty Culture Act and Section 18 of the Barbers' Act, it is apparent that the trades of a barber and a beauty culturists have many things in common in addition to the necessity for taking health precautions in the practice of both. By the bill it is shown that the cutting and trimming of hair is necessarily incident to the trade of a beauty culturist, and, of course, is necessary to the trade of a barber. Section 2 of the Beauty Culture Act has withdrawn hair cutting and trimming from the trade of beauty culture and given it to the trade of barber. Thus no beauty culturist can be authorized to practice her trade unless she is a barber, qualified by years of training to shave men and trim their beards. A period of 1,248 hours of study in a school or college of barbering and of two and a half years of service in a barber shop as an apprentice cannot be regarded as a necessary or reasonable requirement to qualify a beauty culturist to cut and trim hair. *The incidental part of the trade of beauty culture, consisting of cutting and trimming hair, is taken from that trade and given to the trade of barber under the guise of a police regulation, which can find no support as a reasonable measure either to preserve the health or to secure the safety, welfare, or comfort of society.* * *"

Yet another analogous case is *Moore* v. *Grillis*, 205 Miss. 865, 39 So. 2d 505, which dealt with a Mississippi statute amending a former statute relating to the licensing of certified public accountants in such manner as to provide that it should be unlawful for any person, except a certified public accountant who had complied with the requirements of the statute, or an attorney, or their employees, to charge or receive, directly or indirectly, any fee for making or preparing any tax return. The statute included a penalty by way of fine or imprisonment in the county jail. The appellants were not certified public accountants and were seeking to recover for services performed by them in preparing income tax returns. The Supreme Court of Mississippi held the statute unconstitutional, saying, pp. 509-510:

> "* * * As we have declared, if a statute purporting to protect public health, morals or safety, has no real relation to those objects, or is a palpable invasion of rights secured by fundamental law, courts must so adjudge and thereby give effect to the constitution. * * *
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> "The whole ultimate effect of Section 8912 is to prohibit uncertified accountants, or preparers of tax returns, from earning a living thereat, or, at least from receiving compensation therefor. Counsel for appellee contends that is a mere regulation. Regulation, it seems to us, is one thing, but prohibition of doing a thing, thereby eliminating the practice to be regulated, is another thing entirely. It is a common right of the people, to enjoy 'Life, Liberty and the pursuit of Happiness,' and the right of the citizen of this state to employ whom they choose to make their tax returns, even though one so employed be not a certified public accountant, or attorney, is within those prerogatives of the people. The tax returns must be correctly prepared because they will be checked, and errors therein required to be corrected

by the tax officials, State or Federal, to whom the returns must be submitted. This would be true, whether the service of preparing the tax return were rendered by a certified public accountant, attorney, uncertified public accountant, or other persons. Certification of the accountant in making the return would possess no special sanctity there. *'Cu jusvis hominis est errare'* —any man may make a mistake. Cicero, Philippicae. No. xii, Sec. 2. and, Fabius Maximus long ago pointed out that it is beyond man's power to avoid all mistakes. Plutarch's Lives, Fabius, Ch. 13, Sec. 1. If such errors persistently occurred and recurred on the part of any person preparing such returns, with much frequency, this inefficiency would soon eliminate him from public demand in preparing tax returns, without the intervention of any state board. 'Liberty' within constitutional provisions against depriving any person thereof except by due process of law includes 'liberty of contract,' which, in turn, means freedom from arbitrary or unreasonable restraint. * * *''

To a similar effect are *Liggett Co.* v. *Baldrige,* 278 U. S. 105; *State* v. *Riedell,* 109 Okla. 35, 233 Pac. 684 and *New Jersey Used Car Trade Association* v. *Magee,* 1 N. J. Sup. 371, 61 A. 2d 751.

Also pertinent to the lack of any relation between Section 2 and the public welfare is *Palmer* v. *Smith,* 229 N. C. 612, 51 S. E. 2d 8. There the court had under consideration §90-115 of the General Statutes of North Carolina, which provided in part as follows, p. 10:

"* * * 'Within the meaning of this article, a person shall be deemed as practicing optometry who does, or attempts to, sell, furnish, *replace, or duplicate, a lens,* frame, or mounting, or furnishes any kind of material or apparatus for ophthalmic use, *without a written prescription from a person authorized under the laws of the State of North Carolina to practice optometry, or from a person authorized un-*

der the laws of North Carolina to practice medicine,' * * * ". (Emphasis added.)

Under that statute an injunction was sought against a dispensing optician enjoining him from selling or duplicating lenses or frames without a prescription from a licensed optometrist. The trial court refused to issue such an injunction upon the ground that the section quoted above violated Section 1 of the XIV Amendment to the Federal Constitution. On appeal the Supreme Court of North Carolina affirmed, holding that an optician cannot be forbidden to duplicate lenses or replace lenses into frames or mountings because the acts of duplicating lenses and replacing lenses into frames are mechanical and in practice are customarily done by opticians. In the course of its opinion the court said, pages 10-12:

"The sole question for determination on this appeal, is whether or not an optical mechanic is practicing optometry when he replaces or duplicates an ophthalmic lense, or replaces or duplicates the frame or mounting for such lense. * * *

* * * * * * *

"* * * The plaintiffs insist, however, that the duplication of an ophthalmic lense or the duplication or replacement of a frame or mounting for such lenses, constitutes the practice of optometry, and is not a mere mechanical operation or process which an optician has the right to perform.

"* * * 'Private business may not be regulated or converted into public business by legislative fiat.' 11 Am. Jur., p. 1060, Sec. 294. Moreover, the exercise of the police power will not be upheld where its use tends only to create a monopoly or special privilege and does not tend to preserve the public health, safety or welfare. *State* v. *Lockey*, 198 N. C. 551, 152 S. E. 693; *Georgia State Board of Examiners in Op-*

tometry v. *Friedmans' Jewelers, Inc.*, 183 Ga. 669, 189 S. E. 238; *People* v. *Griffith*, 280 Ill. 18, 117 N. E. 195; *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 49 S. Ct. 57, 73 L. Ed. 204.

"It is undisputed on the record that a qualified optician can take a whole or broken lense and by the use of a vertometer or lensometer, duplicate such lense with accuracy and exactness. The process of duplication is conceded to be a purely mechanical one. • • •

• • • • • • • •

"We do not think the duplication of an ophthalmic lense or the duplication or replacement of a frame or mounting for such lenses, constitutes the practice of optometry as defined in G. S. §90-114. And what was said in *State* v. *Harris, supra* [216 N. C. 746, 6 S. E. 2d 866], applies with equal force to the factual situation here. There the court said: 'Obedience to the constitution on the part of the legislature is no more necessary to orderly government than the exercise of the power of the court in requiring it when the legislature inadvertently exceeds its limitations. "It has been frequently stated, in cases where the questions are presented for judicial review, that in order to sustain legislation under the police power, the courts must be able to see that its operation tends in some degree to prevent some offense or evil or to preserve public health, morals, safety, and welfare, and that if a statute discloses no such purpose, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by fundamental law, it is the duty of the courts so to adjudge and thereby give effect to the constitution." 11 Am. Jur., p. 1087, Section 306. In such a situation the duty of the court is clear.' "

To paraphrase the language of the *Palmer* case, this Court, in order to sustain Section 2 of House Bill No. 953 under the police power, must be able to see that the opera-

tion of that section tends in some degree to prevent some offense or evil or to preserve the public health and welfare. Here the evidence clearly establishes that no evil or harm can flow from opticians, without prescription, fitting, adjusting and duplicating eyeglasses and placing and replacing lenses into frames. Hence, the statute can have no real or substantial relation to the public health and welfare and is a palpable invasion of opticians' rights secured by fundamental law. Such being the case, the statute violates the XIV Amendment to the Federal Constitution.

In *Kindy Opticians, Inc.* v. *Michigan State Board of Examiners*, 291 Mich. 152, 289 N. W. 112, the trial court had enjoined plaintiff, a dispensing optician, from adjusting eyeglasses to persons by fitting, adapting, adjusting or bending their frames with or without lenses and from holding himself out to the public as being able to do so under a Michigan statute which purported to prohibit such acts except upon a written prescription from a licensed practitioner. The Supreme Court of Michigan dissolved the injunction and held that the act was not applicable to a dispensing optician because its title related only to optometrists. In so holding the court said, page 113:

> "The record is convincing that the business in which the plaintiff was engaged was that of a dispensing optician. The title of the act relates to optometrists only, and not to opticians. We must, therefore, hold that plaintiff was entitled to the relief sought, namely, a declaration by the court that its business, that of a dispensing optician, cannot be interfered with by the defendants, or any of them, while it is engaged in the lawful prosecution of its business."

Implicit in the decision of the Supreme Court of Michigan in the *Kindy* case is the finding that the fitting,

adapting, adjusting or bending of eyeglasses *to the face* of a person either with or without prescription does not constitute the practice of optometry. *A fortiori,* if an optician's fitting, adapting or adjusting of eyeglasses does not constitute the practice of optometry a state legislature cannot under the Federal Constitution enact legislation which by legislative fiat transposes that business from opticians to optometrists.

Under the authorities discussed above, Section 2 of House Bill No. 953 is unconstitutional because all the evidence introduced demonstrates that the fitting, adjusting and duplication of eyeglasses by opticians is not an "evil" and that the prohibitions contained in that section have no real and substantial relationship to the announced purpose of the act—the protection of the public's health and welfare.

B. Section 2 is unconstitutional because it delegates to ophthalmologists and optometrists the authority to determine who shall do business as a dispensing optician.

The exception to the flat prohibition of Section 2 is that the fitting, adjusting and adapting of lenses, frames, etc., and duplication of lenses and their insertion into frames may be done by an optical supplier "authorized"[26] to do so in the written prescription of an Oklahoma ophthalmologist or optometrist. The obvious effect of this proviso when considered in the light of the "responsibility" provision of Section 2 is to compel the ophthalmologist to

[26]This "authorization" as used in Section 2 and as interpreted by defendants is meaningless. Thus, all the optician needs to duplicate, fit and adjust, etc. without violating the law is a prescription containing only the power of the lenses. Without anything more he can duplicate, fit and adjust eyeglasses for as long as his customer desires. (R. 183-184). Section 2 does not, as stated by the American Optometric Association (Brief, p. 25) "* * * make the purchase of new frames or the duplication of old lenses the occasion for a professional eye examination by a licensed optometrist or ophthalmologist."

designate a specific optician to interpret his prescription. Thus, in answer to the question of whether he would permit his prescriptions to be taken by his patient to any optician that the patient might choose if Oklahoma law made him responsible for the glasses dispensed by the optician, Dr. Coston stated that he would not, and further said that in such event he would direct the patient to "an optician" whom he knew to be reputable and reliable (R. 100). As a matter of plain, common sense the ophthalmologist, under such circumstances, is going to direct his prescriptions to one or two named opticians for he cannot afford to assume responsibility for any optician his patient might choose anywhere in Oklahoma or in any of the other forty-eight states. Consequently, one effect of the "responsibility" portion of Section 2 is to delegate to ophthalmologists the power to determine who may act as dispensing opticians in Oklahoma without the legislature's having established any standards for the exercise of that power. Such a delegation is violative of both the due process and equal protection clauses of the XIV Amendment.

Moreover, the unrestricted authority attempted to be conferred upon ophthalmologists and optometrists by Section 2 cannot be sustained upon the ground that the public health and welfare requires opticians to be properly qualified to follow their calling. Plaintiffs concede that the State of Oklahoma has the power, if it so desires, to regulate and prescribe standards for opticians. But House Bill No. 953 is not a law providing standards or regulations for opticians. Rather, it is a law that deprives opticians of a substantial portion of their business, which deprived portion of the opticians' business is transferred to optometrists or else channeled into the hands of a few opticians who possess the favor of ophthalmologists. Ab-

solutely no criteria are set out in the statute to guide or control optometrists and ophthalmologists in determining what education, training or experience opticians should have to be qualified to perform their work, thereby creating a situation in which the right of one to practice as an optician is subjected to different, and constantly varying standards to be determined unilaterally by various private individuals.

In *People* v. *Brown*, 407 Ill. 565, 95 N. E. 2d 888, the Supreme Court of Illinois held unconstitutional a provision of the Illinois Plumbing License Law which had the effect of denying to citizens the right to become apprenticed plumbers, journeyman plumbers, or master plumbers unless a master plumber so willed it. In its opinion the court said, page 893:

> "* * * The legislature cannot enact a lawful statute by invoking the police power on the pretense of protecting public interests when the actual objective of the statute constitutes an arbitrary interference with private business, or imposes unusual and unnecessary restrictions upon lawful occupations; if such statute does not tend to preserve the public health, safety or welfare, it is void as an invasion of individual property rights. *People* v. *Carolene Products Co.*, 345 Ill. 166, 177 N. E. 698.
>
> "Obstacles are interposed by the act to a person freely and of his own choice engaging in the occupation of master plumber, the trade of journeyman plumber, and the activity of learning the trade by apprenticeship. One cannot be a licensed master plumber unless he has prior thereto been a licensed journeyman plumber, and before that a certified registered plumber's apprentice. No matter how well qualified a person may be by instruction and training, he can never of his own free will and choice become a certified registered plumber's apprentice, a

journeyman plumber or master plumber, unless a licensed master plumber so wills. * * *

* * * * * * *

"A class cannot be created through the medium of an arbitrary statutory declaration by the legislature in order that it may be the recipient of special and exclusive legislative favors. To render the classification a valid one in such instances, it must rest on material distinctions in the situation and in the circumstances of individuals who are to be recipients of the favors. Those grounds of distinction and classification must be related in reason and principle to the privileges granted to individuals, as a class, by the legislature. *Marallis* v. *City of Chicago*, 349 Ill. 422, 182 N. E. 394, 83 A. L. R. 1222; *People ex rel. Akin* v. *Board of Supervisors*, 185 Ill. 288, 56 N. E. 1044. *The legislature, by the act under consideration, has interfered with the inherent right of citizens freely and of their own choice to engage in the legitimate vocation of learning the trade of journeyman plumber.* The inherent police power of the State was used to bring about that interference, and such interference must be related to the health, safety or general welfare of the public. * * *" (Emphasis added.)

To the same effect see *City of Sioux Falls* v. *Kadinger*, 74 S. D. 217, 50 N. W. 2d 797; *State* v. *Crawford*, 104 Kan. 141, 177 Pac. 360; *Smith* v. *State of Texas*, 233 U. S. 630; and *People* v. *Ringe*, 197 N. Y. 143, 90 N. E. 451.

There are many authorities holding that a state legislature cannot validly delegate even to official agencies of the state complete power to determine the qualifications of persons to engage in prescribed occupations without standards of any sort. *Harrigan & Reid Co.* v. *Burton*, 224 Mich. 564, 195 N. W. 60; *Dean Milk Co.* v. *City of Aurora*, 404 Ill. 331, 88 N. E. 2d 827; *City of St. Louis* v. *Polar Wave Ice & Fuel Co.*, 317 Mo. 907, 296 S. W. 993. If such unbridled discretion cannot be conferred upon ad-

ministrative agencies of a state, it most certainly cannot be conferred upon private individuals such as optometrists and ophthalmologists.

If Oklahoma desires to provide special qualifications for persons engaged in the vocation of opticianry, it has the power to adopt acts licensing and qualifying opticians. Accordingly, it is submitted that Section 2 of House Bill No. 953 is unconstitutional in that it deprives plaintiffs and persons similarly situated of the right to engage in a lawful business and in effect delegates the control of that business to private individuals who may exercise the authority delegated arbitrarily and capriciously in violation of the XIV Amendment.

C. Section 2 of House Bill No. 953 is unconstitutional under the XIV Amendment because it unreasonably, arbitrarily and capriciously discriminates against plaintiffs and persons similarly situated by exempting from its requirements the sale of ready-to-wear glasses equipped with convexspherica lenses.

Despite the numerous restrictions placed by Section 2 upon the sale of lenses, frames and eyeglasses by dispensing opticians, Section 3 of House Bill No. 953 provides:

> "* * * Nothing in this act shall prohibit the sale of ready-to-wear glasses equipped with convexspherical lenses * * * when sold as merchandise at any established place of business and where the selection of the glasses is at the discretion of the purchaser."

Convexspherical lenses represent one type of lens customarily sold by opticians. There is no difference between the effect of identical convexspherical lenses whether prescribed or purchased ready to wear. Furthermore, there is no difference in their effect upon the wearer's eyes from that of other than convexspherical lenses. In short, either type can cause any permanent damage to the eye,

even though the lens may not be the proper one to correct the refractive error in the wearer's eyes. Consequently, there is in fact no real difference in classification, so far as the public health and welfare is concerned, between eyeglasses containing all types of lenses and ready-made eyeglasses containing only convexspherical lenses.

The law is well settled that while the equal protection clause of the Fourteenth Amendment does not prevent a state legislature from resorting to classification in a police power measure, yet the classification, to come within the sanction of the clause, must be reasonable and not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated are treated alike. *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, *Old Dearborn D. Co.* v. *Seagram Distil. Corp.*, 299 U. S. 183. Since there is in fact no difference between eyeglasses containing convexspherical lenses and other glasses so far as the public health and welfare are concerned the exemption of convexspherical lenses from the provisions of Section 2 is an unreasonable, arbitrary and capricious discrimination against plaintiffs and other opticians.

A somewhat analogous purported classification was under consideration in *People* v. *Weiner*, 271 Ill. 74, 110 N. E. 870. In that case the court considered an Illinois statute which forbade the use of certain second-hand material in the making of mattresses. However, the same prohibition did not apply to pillows. In holding that the statute was unconstitutional because of the arbitrary and unreasonable classification, the court said, pp. 873-874:

> "Counsel for plaintiff in error further argue that there is a discrimination between the manufacturers and dealers in pillows and manufacturers and dealers in mattresses, comforters and quilts, especially after

they have been used, as there is no provision made as to pillows; that, so far as this act is concerned, material made secondhand in the same way as the material in mattresses may again be made into pillows and sold without any regulation whatever. Under the decisions of this state this is class legislation. *People* v. *Schenck, supra; Josma* v. *Western Steel Car Co.*, 249 Ill. 508, 94 N. E. 945; *Manowsky* v. *Stephan*, 233 Ill. 409, 84 N. E. 365; *Horwich* v. *Walker-Gordon Laboratory Co.*, 205 Ill. 497, 68 N. E. 938, 98 Am. St. Rep. 254; *Lippman* v. *People*, 175 Ill. 101, 51 N. E. 872; 1 Lewis' Sutherland on Stat. Const. (2d ed.), §203. The provisions of sections 1 and 2 of the act are arbitrary and unreasonable, and must be held unconstitutional and void."

And in *City of Chicago* v. *Netcher*, 183 Ill. 104, 55 N. E. 707, the court held unconstitutional an ordinance that provided:

"• • • 'It shall be unlawful for any person, firm or corporation doing business in this city, where dry goods, clothing, jewelry, and drugs are sold, to have exposed for sale, or sell to any person, firm, or corporation, any meats, fish, butter, cheese, lard, vegetables or any other provisions.' • • •"

In the lower court it had been agreed that the defendant owned and operated a store in which he sold dry goods, clothing, jewelry and drugs, and also in the same store, but on a different floor, sold meats, fish, butter, cheese, lard, vegetables and other provisions. In its opinion the court said, pp. 708-709:

"• • • But this ordinance does not regulate the business of selling provisions, nor prescribe the manner in which the business shall be carried on. It merely prohibits persons engaged in the business of selling dry goods, clothing, jewelry, and drugs from selling in their stores the provisions enumerated in

the ordinance. It permits a person to sell in any place or manner, provided, only, that he does not at the same time sell certain other things. A dealer may sell provisions at the same place with hardware, furniture, boots and shoes, hats and caps, millinery, books and stationery, crockery and glassware, carpets, confectionery, wooden ware, wallpaper, or any other sort of merchandise except dry goods, clothing, jewelry, and drugs. This is not a regulation, but a prohibition, and a purely arbitrary one, which attempts to deprive certain persons of exercising a right which has always been lawful, and has been heretofore exercised throughout the state and country without question. The ordinance is also an attempted interference by the city with rights guaranteed to the defendant by the constitutions of the United States and of the state. * * *

* * * * * * *

"* * * It is plain that its object is not to protect the health, morals, or safety of the public, or to accomplish any object falling within the police power. It is a mere attempt to deny a property right to a particular class in the community, where all other members of the community are left to enjoy it. * * *"

Since there is no real difference in their impact upon the eyeglass-wearing public between ready-made eyeglasses containing convexspherical lenses and all other types of eyeglasses, the classification in House Bill No. 953 of ready-to-wear eyeglasses with convexspherical lenses and prescription eyeglasses into different groups so far as fitting, adjusting and duplication are concerned, and the imposition of restrictions as to those functions upon only prescription eyeglasses is clearly an arbitrary, unreasonable and capricious classification that contravenes the "equal protection" clause of the XIV Amendment.

II.

In depriving plaintiffs of the right to advertise their merchandise and services, Section 3 of House Bill No. 953 violates the XIV Amendment and also imposes unreasonable restrictions upon Interstate Commerce in violation of Article I, Section 8 of the United States Constitution.

A. The denial to opticians of the right to advertise their merchandise and services violates the XIV Amendment.

The evidence below established that plaintiffs and other opticians are engaged in an occupation of a dual nature. On the one hand they act as skilled craftsmen, while on the other they act as vendors of standard items of merchandise, such as frames, lenses and other optical supplies (R. 98, 116-117, 133, 145, 278). In fulfilling their merchandising functions opticians customarily advertise their calling, their merchandise and services (R. 167, 211-212, 216). Doctors Coston, Cordes, Braley and Lemoine all testified that in their opinion, proper advertising by opticians was neither objectionable nor detrimental to the public health and welfare (R. 109, 305, 365, 377).

Section 3 of House Bill No. 953 completely prohibits all advertising by all persons not only of complete eyeglasses, but also of frames, lenses and all other optical appliances[27]. While not mentioned specifically, the language of the prohibition would seem to include such optical instruments as telescopes, binoculars, transits, sextants, eyeglass adornments and other similar optical devices. The statute prohibits the solicitation of the sale of any such merchandise by any advertising media, specifically including window displays and telephone directory

[27]Defendants took the position below that the advertising prohibitions of Section 3 do not apply to the sale of ready-to-wear eyeglasses (R. 193-194). Another exception is "ethical education publicity or advertising" by a "legally qualified health group." Query: Are such organizations as The American Optometric Association and the Oklahoma Optometric Association "legally qualified health groups" that may advertise?

display advertisements. The section is unlimited in its application and applies to manufacturers such as American Optical Company, Bausch & Lomb and wholesalers, as well as opticians.

The court below found that Section 3 was unconstitutional in so far as it applied to frames, mountings or other optical appliances. However, it upheld the constitutionality of that section with respect to the advertising prohibitions against eyeglasses, lenses and prisms (R. 53-58). It is from that holding that plaintiffs have appealed in Number 185.

Plaintiffs do not challenge, and are not entitled to challenge, the constitutionality of Section 3 as applied to optometrists or ophthalmologists. In fact, by virtue of Section 7 of the Act, plaintiffs assume that Section 3 will remain in force as to professional practitioners even though the section be held unconstitutional as to dispensing opticians.

In their second proposition defendants cite various cases as authority for the complete statutory ban against all advertising by all persons contained in Section 3. Those cases simply do not so hold, for they are either cases concerned with the elimination of specific kinds of advertising of eyeglasses deemed abusive or cases regulating professional advertising by optometrists, dentists or lawyers. They do not hold and are not in any sense authority for the proposition that a state, through the exercise of its police power, may constitutionally completely prohibit *all types of advertising* of his business or wares by a craftsman or, for that matter, by wholesalers and manufacturers.

Also, on page 39 and again on page 48 of defendants' brief it is stated that 28 states have laws "prohibiting advertising in the field of visual care." This statement is

misleading for the reason that such laws are regulatory or prohibitive of certain advertising practices such as price, misleading or bait advertising, and frequently regulate only the practitioner of optometry rather than ophthalmic dispensers or other trades people[28]. With the possible exception of Section 1065 of the Louisiana Statutes relating to retailers and discussed in the *Rones* case, *infra*, we are not aware of any statute completely prohibiting all advertising of eyeglasses, frames, lenses and optical appliances of every kind or character whether or not bait, misleading or otherwise unwholesome, by any person or entity handling the same. It is submitted that there is no conceivable interest of the public so imperative and so general as to merit the condemnation of each and every form of advertising of optical appliances. To the contrary, it is to the best interests of the people of Oklahoma to be accurately informed respecting the quality and capabilities of optical products and to know who is offering such items for sale. There is no question but that some forms of advertising, such as false, misleading or inflammatory advertising designed to snare the unwary, are harmful. But truthful, dignified advertising harms only those who desire to conceal the truth.

A somewhat similar advertising measure was considered in *Jones* v. *Bontempo*, 137 Ohio St. 634, 32 N. E. 2d 17. There an Ohio statute that prohibited the advertising of prices of barber services in any form whatsoever was involved. The case arose when the State Board of Barber Examiners suspended plaintiff's license for having advertised "Haircutting 25-cents" in a window of his shop. An action was brought by the barber to set aside the board's order of suspension. In determining

[28]The same observation applies to the series of state statutes cited in the footnotes to pages 36, 43 and 44 of the American Optometric Association's brief.

that the statute was unconstitutional because the prohibition of advertising price had no sufficient relation to the public health and welfare, the court said, p. 18:

> "The trade of barbering, operating as it does directly on the person of the customer, affects the health, comfort and safety of the public and may be regulated within reasonable limits by the legislative branch of the government under that power known as the police power, 'conceded to reside in the people's representatives, which is rightfully exercised by the regulation of the use of private property, or so restraining personal action, as to secure or tend to the comfort, health, or protection of the community.' * * *
>
> * * * * * * * *
>
> "However, legislation of this character must bear some discernible relationship to the public health or welfare, and the General Assembly cannot under the guise of its police power impose unreasonable, captious or arbitrary rules, having no recognizable connection therewith.
>
> "How the mere advertising of the price of haircuts as done by the plaintiff could in any wise affect public health or welfare is difficult to understand.
>
> "If this legislation, absolutely prohibiting the advertising of prices of barber services, were to be upheld, it would likewise be necessary to uphold legislation prohibiting the vendors of groceries, meats or other commodities from advertising prices thereof in any manner, the unreasonableness of which is at once apparent."

Also, in *Regal Oil Co.* v. *State*, 123 N. J. L. 456, 10 A. 2d 495, the defendant was convicted of illegally displaying a sign relating to the price at which it sold gasoline in violation of a New Jersey statute providing that the price of gasoline must appear on each gas pump in the manner

regulated by the State Tax Commissioner and that no other sign relating to the price of gasoline was to be allowed. The defendant had used a large sign for the purpose of attracting passing motorists to his station. The State Tax Commissioner had issued regulations providing that each gas pump should have a sign stating the price per gallon of not less than 5½" x 8" and not more than 8" x 10". The defendant testified that he was an "independent" dealer and that he was forced to sell his gasoline at a slightly lower price in order to compete with the major companies in the industry. The court held that the statute had no substantial relation to the public health and general welfare and that it constituted an unreasonable restriction on the defendant's business, thus depriving it of property without due process of law in violation of the XIV Amendment of the Constitution of the United States. The court pointed out, at 10 A. 2d 497-498;

> "• • • The legal principles involved are rather well established. While it is true that a state may, in the exercise of its police power, pass legislation for the purpose of protecting and regulating public health, public safety, public morals, general welfare • • •, including public convenience or the general prosperity • • •, it is equally true that this power is not without limitations. The means adopted must be reasonably adapted to the accomplishment of that end, and must not be arbitrary or oppressive. • • • In other words, the legislation must bear a real and substantial relation to the public health, safety, morals or some other phase of general welfare. • • • Thus a regulation which in effect denies or unreasonably curtails the common right to engage in a lawful business cannot be sustained under the 14th Amendment. For as was said in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 278, 52 S. Ct. 371, 374, 76 L. Ed. 747, 754, "• • • nothing is more clearly settled than that it is beyond the power of a state, "under the guise of pro-

> tecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." * * *' "

And in *Levy* v. *City of Pontiac*, 331 Mich. 100, 49 N. W. 2d 80, an ordinance of the city of Pontiac that provided, "* * * No sign or placard stating the price or prices of gasoline other than such signs or placards as hereinabove provided [signs not larger than 12"x12" attached to pumps or dispensing devices] shall be posted or maintained on the premises on which said gasoline is sold or offered for sale." The Supreme Court of Michigan found that the ordinance bore no reasonable relation to public peace, health, morals, welfare or safety and held the ordinance unconstitutional, saying, p. 82:

> "It is within the police power to prohibit false, fraudulent or misleading advertising. *Jasnowski* v. *Judge of Recorder's Court*, 192 Mich. 139, 158 N. W. 229, and *People* v. *Austin*, 301 Mich. 456, 3 N. W. 2d 841.
>
> *"The right to advertise one's merchandise is, subject to the police power mentioned, within the right to liberty and property. The denial of such right is a taking of property without due process of law.* Ritholz v. *City of Detroit*, 308 Mich. 258, 13 N. W. 2d 283.
>
> "Business practices, such as the one against which the ordinance in question is directed, have no detrimental effect on public health, peace, morals, safety and welfare. The size of signs which plaintiff may care to use, and their location at points other than the pumps, if such signs are not misleading or fraudulent, may not be regulated by the legislative body of defendant city." (Emphasis added.)

Defendants' misconstruction and misplaced, unacknowledged emphasis by the italicization of quotations[29] from the decision in *State* v. *Rones*, 223 La. 839, 67 So. 2d 99, distort a decision upholding a statutory regulation of *price advertising* of eyeglasses into a decision validating a statutory prohibition of *all advertising*. The facts in the *Rones* case were these: The defendant, Rones, had run an ad in a daily newspaper in New Orleans which, among other things, advertised the price of eyeglasses and also that at his place of business there were "highly experienced opticians to carefully fit your glasses." L. S. A., R. S. 37:1063(9) provided that:

> "No person shall:
>
> * * * * * * *
>
> "(9) Advertise as free or for a price, any of the following: The examination, or treatment of the eyes; the furnishing of optometrical services; or the furnishing of a lens, lenses, glasses, or the frames or fittings thereof."

L. S. A., R. S. 37:1065, provided that:

> "The provisions of this Chapter shall not apply to * * * retail dealers selling glasses as merchandise in their established places of business. * * *
>
> "No retail dealer shall directly or indirectly, advertise through any medium the sale of glasses, or peddle, solicit, sell, or offer for sale glasses from door to door, or house to house, or away from his permanent established place of business."

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[29] The italicized portions of the quotations appearing on pages 45 and 46 of defendants' brief are defendants' and not the court's, except for the word "any" in the second paragraph. In the opinion that paragraph actually appears as follows:

> "The question presented by this case is whether a statute which prohibits *any* person, thereby including a retail dealer, from advertising the sale of glasses, lenses, etc., *for a price or without cost* is a reasonable regulation within the police power of the State and therefore constitutional." (67 So. (2) 105).

A criminal proceeding in two counts was filed against Rones, charging him with violation of L. S. A., R. S. 37:1063(9). The first count was that Rones had "* * * willfully and and unlawfully advertised as free or for a price the furnishing of optometrical services * * *," while the second was that he had "* * * willfully and unlawfully advertised for a price the furnishing of a lens and lenses and glasses and the frames and fittings thereof." Rones demurred to both counts, the first upon the ground that he was only advertising *optical* services, which was not within the prohibition of the statute regulating the profession of optometry (L. S. A., R. S., Title 37, Chapter 12, Sections 1041 *et seq.*), and hence, that his advertisement of "highly experienced opticians to carefully fit your glasses" was not the advertisement of optometrical services within the meaning of the statute. Rones' demurrer to the second count was based upon the contention that the first paragraph quoted above from Section 1065 exempted retail dealers from the provisions of Section 1063(9). With respect to the first count, the court said, p. 101:

> "The problem, then, is whether the advertisement of 'highly experienced opticians to *carefully fit* your glasses' was an advertisement of the furnishing of optometrical services within the meaning of the statute."

And with respect to the second count, p. 105:

> "The question presented by this case is whether a statute which prohibits *any* person, thereby including a retail dealer, from advertising the sale of glasses, lenses, etc., *for a price or without cost* is a reasonable regulation within the police power of the State and therefore constitutional."

With respect to Rones' contention that Section 1065 removed him from the operation of Section 1063(9), the court pointed out that while the first sentence exempted retail dealers selling glasses as merchandise in their established places of business, nevertheless, the second paragraph of the same section provided an exception to that exemption by prohibiting retail dealers from directly or indirectly advertising through any medium the sale of glasses. The court held that even though Rones as an optician was engaged in the sale of glasses at retail, he was not excepted from the prohibition of Section 1063(9) against advertising *for a price* the furnishing of lenses and glasses. The court then said, p. 103:

> "* * * In this connection we observe that the second paragraph of Section 1065, which makes it clear that retailers are not excepted from the advertising prohibition, is a broader prohibition than is Section 1063(9). The advertising prohibited by the last mentioned section is that 'free' or 'for a price,' whereas the advertising prohibited in the second paragraph of Section 1065 is unqualified as to kind or type for it says 'directly or indirectly advertise through any medium.' *In its broadest application, as we shall discuss later in this opinion, this second paragraph may present a serious constitutional question as to whether it is a valid exercise of the police power,* but in a limited application, which is all we are concerned with here, it serves to take retailers out of the general exemption in the first paragraph of Section 1065 insofar as that exemption could affect the scope of Section 1063(9), so that retailers are included in the word 'person' in that subsection and are prohibited from advertising in the manner denounced by it." (Emphasis added.)

Later in its opinion the court said, p. 105-6:

> "Under the provisions of the second paragraph of Section 1065 of the optometry statute, a retail dealer

> is prohibited from directly or indirectly advertising through any medium the sale of glasses, and under this provision an individual could be charged with advertising the sale of glasses even though the glasses were not offered in violation of Section 1063(9) as free or for a price. If the Legislature intended that under Section 1065 retailers of eyeglasses could be charged for advertising that would not be a violation of Section 1063(9), a more serious constitutional question would be presented, and, to the extent that the prohibition against advertising by retailers in Section 1065 is broader than that in Section 1063(9), a plea of unconstitutionality might have merit. However, we are not called upon here to decide this question for the reason that appellant in this case is being prosecuted under Section 1063(9), a reasonable regulation under the police power of the State."

The foregoing analysis makes it clear that the decision in the *Rones* case was only concerned with a statutory regulation of the advertisement of the *price* of eyeglasses and optometric services. The paragraph of Section 1065 which on its face would seem to prohibit all advertising was not only not involved in the case, but also, the court specifically questioned the constitutionality of such a prohibition had it been in issue. So far as plaintiffs are aware, the holding of unconstitutionality of a somewhat similar advertising prohibition as to dental laboratories in *Amsel* v. *Brooks,* 141 Conn. 288, 106 A. 2d 152, 158, appeal dismissed ..... U. S. ....., 99 L. Ed. (adv. p. 77), and the expression of doubt as to constitutionality in the *Rones* case are the only direct judicial statements bearing upon the issues raised by the complete prohibition of advertising contained in Section 3 of the Oklahoma Act.

Commonwealth v. *Ferris,* 305 Mass. 233, 25 N. E. 2d 378, did not, as asserted by defendants on page 51 of their brief, involve a statute "prohibiting advertising,"

but rather, as the *Rones* case, involved a statutory prohibition of *price* advertising. Similarly, *City of Springfield* v. *Hurst,* 144 O. St. 49, 56 N. E. 2d 185, cited on page 48 of defendants' brief, involved only a prohibition of *price and credit* advertising. It should be noted that statutes prohibiting price advertising of eyeglasses have been held unconstitutional in *Ritholz* v. *City of Detroit,* 308 Mich. 258, 13 N. W. 2d 283, and *State ex rel. Booth* v. *Beck Jewelry Enterprises, Inc.,* 200 Ind. 276, 41 N. E. 2d 622.

Klein v. *Department of Registration & Education,* 412 Ill. 75, 105 N. E. 2d 758, cited on page 53 of defendants' brief, was an action attacking the constitutionality of certain provisions of the Illinois Optometric Practice Act in their impact upon the plaintiff, Klein, a duly qualified registered and practicing optometrist. Klein expressly admitted, as do plaintiffs here, that the practice of optometry affects the public health and welfare and, hence, is a subject for proper regulation under the state's police power. So, in that case, the inquiry was whether the statutory regulations had a definite relation to the ends sought to be obtained. Here, there is no question concerning the power of the State of Oklahoma, through the exercise of the police power, properly to regulate advertising by those engaged in the practice of the statutory profession of optometry. Furthermore, the Illinois Act did not purport to prohibit all forms of advertising even by optometrists; it merely imposed certain regulations thereon. Accordingly, this decision, too, is not in point upon the problem presented by Section 3.

Similarly, *Semler* v. *Oregon State Board of Dental Examiners,* 294 U. S. 608, involved only the regulation of advertising by persons practicing dentistry. Moreover, dentures and eyeglasses are not comparable items. The

former are deemed to constitute the rendition of a service because they are unique articles completely fabricated from raw materials for the exclusive treatment of one specific individual; the latter are merchandise. See *Commonwealth* v. *Miller*, 337 Pa. 246, 11 A. 2d 141, 142; *Rice* v. *Evatt*, 144 Ohio St. 483, 59 N. E. 2d 927, 928-929; *Klein* v. *Department of Registration and Education, supra*, p. 762.

Plaintiffs fail to detect the relevancy of *Curtis* v. *Registered Dentists of Oklahoma*, 193 Okla. 233, 143 P. 2d 427; *State Bar* v. *Retail Credit Association*, 170 Okla. 246, 37 P. 2d 954, or *In re Co-operative Law Company*, 198 N. Y. 479, 92 N. E. 15, cited pp. 42-44 of defendants' brief, to the constitutional issues involved in this case. The *Curtis* case was an action to enforce a licensing statute defining a practitioner of dentistry to include "any person" who "supplies artificial substitutes for natural teeth" against an unlicensed person purporting to operate a dental laboratory. The sole similarity to the present case lies in the irrelevant coincidence that the defendant was advertising, thus permitting the court to find that he was holding himself out to the public as being engaged in the practice of dentistry. Admittedly, as stated by defendants, this case is in harmony with the other wholly irrelevant case—the *Retail Credit Association* case—wherein the defendant, operating a collection agency, was held to be engaged in the practice of law. This whole line of authority is entirely foreign to any issue presently before this Court. All the evidence in this case establishes that opticians, in the performance of their functions, act as skilled craftsmen and merchants and not as professional practitioners. They do not hold themselves out as qualified to refract or treat eyes. In this connection, it should be observed that opinion of the medical experts who specifically testified

on advertising by opticians was that truthful, dignified advertising by opticians is not harmful to the public interest (R. 109, 305, 365, 377)[30].

B. Section 3 places an unreasonable burden and restraint on Interstate Commerce.

In addition to depriving plaintiffs of their property without due process of law, Section 3 of House Bill No. 953 also constitutes an unconstitutional interference with interstate commerce. As heretofore shown, this section does not regulate but completely prohibits all advertising of eyeglasses, lenses, frames and other optical goods in newspapers, magazines and over radio and television by dispensing opticians, wholesale opticians, manufacturers and suppliers of optical goods. It makes unlawful advertisments of eyeglasses in nationally circulated publications such as "Time," "Life," Collier's," "Saturday Evening Post" and a host of others, as well as the advertisements of eyeglasses, lenses and prisms, by American Optical Company, Bausch & Lomb, Shuron Optical Company, Univis Lens Company and Titmus Optical Company, that customarily appear in such publications as "The Optical Journal and Review of Optometry,"[31] "The Journal of the American Optical Association,"[32] "Guilderaft,"[33] and "The Optometric Weekly."[34] It would seem also that the illustrated sales catalogues circulated periodically by such

[30]In their brief (page 57) defendants advert to what is described as "The sinister advertising program of the respondents, done in violation of the laws of Oklahoma * * *." There is no evidence in the record which supports the accusation that plaintiffs or any other opticians in the State of Oklahoma are engaging in unduly extensive, inflammatory, misleading advertising or "sinister advertising programs."

[31]Published semi-monthly by the Chilton Co., Inc., Philadelphia 39, Pennsylvania.

[32]Official publication of the American Optical Association.

[33]Published by the Guild of Prescription Opticians of America, Inc.

[34]Published by the Professional Press, Chicago 2, Illinois.

companies as American Optical Company, Bausch & Lomb, Univis and Titmus to ophthalmologists, optometrists, opticians and others, in so far as they include advertisements of eyeglasses, lenses and prisms, violate Section 3. It even prohibits a public health campaign in this field of the type which has been conducted by American Optical Company in such magazines as the "Saturday Evening Post" (R. 356). All of these means of communication constitute interstate commerce, and such an absolute prohibition of advertising by such media places an undue and unreasonable burden and restraint upon such commerce.

That radio, newspapers circulated in more than one state, and television and other instrumentalities of interstate communication are protected by the Commerce Clause as interstate commerce cannot be questioned. See *Associated Press* v. *United States*, 326 U. S. 1, and *Lorain Journal Co.* v. *United States*, 342 U. S. 143. It also well established that local advertising by means of such media constitutes "* * * an inseparable part of the flow of interstate commerce * * *." See *Lorain Journal Co.* v. *United States*, *supra*, page 152. Section 3, by prohibiting advertising of eyeglasses, lenses, prisms and frames in Oklahoma by means of such media, not only burdens, but completely stifles this flow of commerce. The American Optometric Association in its *amicus curiae* brief (page 45, footnote 28) attempts to distinguish the *Lorain Journal* case by stating that there this Court did not pass on the question whether "the out-of-state distribution of some copies of the Journal, coupled with the considerable interstate commerce engaged in by its publisher in the purchase of its operating supplies, provided * * * a sufficient basis for classifying the publisher's entire operation as one in interstate commerce" and that such is the only possibility of interstate commerce here.

Quite to the contrary, as heretofore pointed out, the interstate commerce burdened by Section 3 includes the distribution within Oklahoma of national advertising originating throughout the nation and offering eyeglasses, lenses, etc., for sale on a national scale. Such advertising is similar to that found to be "an inseparable part of the flow of the interstate commerce * * *" in the *Lorain Journal* case (342 U. S. 151-152) and Section 3's absolute prohibition of such advertising is an unconstitutional restraint and burden on that commerce.

Moreover, it has been squarely held by a state court that a statute prohibiting the advertising of a particular article of merchandise constitutes an unconstitutional interference with interstate commerce when the prohibition is applied to advertising in a newspaper which circulates in several states. *State* v. *Salt Lake Tribune Pub. Co.*, 68 Utah 187, 249 Pac. 474, involved the constitutionality of a Utah statute prohibiting all advertising of cigarettes and any forms of tobacco products. A Salt Lake City newspaper, which had many subscribers in other states, was prosecuted under this act for publishing a Lucky Strike advertisement. The plaintiff argued that the prohibition against advertising was an undue burden upon interstate commerce. The court agreed and held the statute unconstitutional. It said that the advertiser was engaged in interstate commerce, that the newspaper was engaged in interstate commerce, and that, therefore, the prohibition against advertising was an undue burden upon interstate commerce. Thus, at page 476:

> "While the state of Utah could perhaps entirely prohibit the sale of cigarettes, in so far as the sales are not protected by the interstate commerce clause of the federal Constitution, yet, as already pointed out, Utah merely regulates the sale of cigarettes as it regulates the sale of many other articles of mer-

chandise. All sales of cigarettes which are made in compliance with the provisions of our statute are lawful. If it is lawful, therefore, to deal in and to sell cigarettes, why is it not lawful to inform those who may legally purchase an article where they may do so? It may be true that the state within its police power may, as a matter of regulation, seek to minimize the sale of an article the use of which it may deem injurious to the public health; and if it may do that, it may, perhaps, regulate or prohibit the advertisement of such an article. Where, however, as is the case here, the article in question is an article of commerce which is protected by the interstate commerce clause of the federal Constitution, it may well be doubted whether the state can interfere with the sale of an article which is so protected. The conclusion therefore seems irresistible that, in view that the advertisement published by the Salt Lake Tribune in and of itself constitutes interstate commerce with which the state of Utah could not interfere, and further that the article likewise was protected both by the laws of Utah permitting its sale and to the extent that the article was shipped into the state in original packages was also protected from interference by the state, the defendant was clearly within its legal rights in publishing the advertisement, and that the statute in question constitutes an undue interference with interstate commerce and therefore cannot be upheld."

The prohibition against advertising in this case applied to cigarettes and other forms of tobacco. The advertising and sale of such articles had long been opposed in Utah on the ground that the use and advertisement of such products offended public tastes. Such advertising was thought to be opposed to good public morals and dangerous for the youth of the state. Despite these reasons, none of which are applicable to the merchandise which the plaintiffs seek to advertise, the statutory prohibition against

advertising was held to be an undue burden upon interstate commerce. The court emphasized that the publication of the advertisement itself in a newspaper constituted interstate commerce which would necessarily be burdened, if the publication were prohibited. The same result was reached on similar facts in *Little* v. *Smith,* 124 Kans. 237, 257 Pac. 959.

It is submitted that the foregoing cases are bottomed upon the proposition that a state may not prohibit advertising by interstate communication of articles of merchandise the sale of which it cannot prohibit. This result should follow whether such inability to prohibit arises by virtue of the protection of the commerce clause or the limitations of the state's police powers. Since it is clear that a statute completely prohibiting the sale of eyeglasses, lenses, frames and other optical appliances would not constitute a valid exercise of the police power, the state may not constitutionally prohibit all advertising of such articles in interstate media without imposing an undue burden on interstate commerce.

C. Section 3 of House Bill No. 953 is unconstitutional as violative of the equal protection clause of the federal constitution.

Although House Bill No. 953 prohibits advertising of eyeglasses and frames and, under a literal interpretation, binoculars, opera glasses, telescopes and magnifying glasses, all of which are standard commercial articles, other standard commercial articles such as food, jewelry, clothing, hearing aids and trusses are not subject to a similar restriction. In fact, Title 59, Section 736.1[35] of the Oklahoma Statutes expressly exempts the advertising of hearing aids and trusses from the prohibition of price advertising set forth in that statute. It is apparent that the

[35]The statute is set forth in the appendix to this brief, page vi.

result is an unreasonable classification and is a hostile discrimination against dispensing opticians, optical manufacturers and other optical suppliers.

Also exempt, as heretofore pointed out, p. 59, is the solicitation for sale by advertising of ready-to-wear eyeglasses. Thus, under defendants' interpretation of Section 3, ready-to-wear eyeglasses equipped with convexspherical lenses, industrial glasses, goggles and sunglasses equipped with plano lenses, may be advertised by any of the media listed in the statute, but eyeglasses containing other types of lenses may not be advertised. It is obvious that the exemptions of ready-to-wear eyeglasses and other prosthetic devices such as hearing aids and trusses, is an arbitrary, discriminatory and unreasonable classification.

In *Truax* v. *Corrigan,* 257 U. S. 312, Mr. Chief Justice Taft, in speaking for the Court with reference to the equal protection clause of the XIV Amendment, said, pages 332-333:

> "The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. * * *"

Since the prohibition against advertising in House Bill No. 953 is a hostile discrimination against dispensing opticians, optical manufacturers and other optical suppliers, Section 3 of House Bill No. 953 violates the equal protection clause of the XIV Amendment.

III.

The court below did not err in holding unconstitutional that part of Section 4 which prohibits a firm engaged in the business of retailing merchandise to the general public from leasing space to a person for the purpose of conducting eye examinations.

A. Such portion of Section 4 is unconstituional because it arbitrarly and unreasonably interferes with the enjoyment and use of private property.

Plaintiff Rips attacked below only that portion of Section 4 that prohibits an optometrist or ophthalmologist from locating his professional office in a retail merchandising establishment. No challenge was or is made of the constitutional authority of a state to prohibit the practice of optometry or ophthalmology as an employee of a lay person, firm or corporation, or the prohibitions against rebates and the solicitation of business. Defendants contend, however, that the power to prohibit those things includes the power to prohibit perfectly legal relationships, such as leases, because they might be designed to circumvent the prohibition against corporate practice. The defense of this proposition is squarely bottomed by defendants on the absolute necessity "to eliminate the loophole whereby commercial control will inevitably be exercised over professional activities through the medium of attractive space or a department in a retail merchandising establishment." (Defendants' brief, p. 59.)

This defense is based upon two constitutional fallacies. The first is that the state is constitutionally permitted to terminate legitimate activities in order to correct evasive activities. This amounts to a constitutional doctrine punishing the righteous in order to include the wrongdoer. If such a doctrine ever found a place in American jurisprudence, it could be justified only in some extreme condi-

tion not found anywhere in the present problem. To detect the use of lease or other legal instruments as a device to avoid a prohibition against lay employment of professional people and to label such practices as violations of the public law has never been a difficult problem for the American judiciary. In fact, *Sears, Roebuck & Co.* v. *State Board of Optometry,* 213 Miss. 710, 57 So. 2d 726, cited and quoted at length by defendants [36] on pages 63 through 67 of their brief, and the numerous cases cited in that decision as well as the cases appearing in the annotations in 102 A. L. R. 343 and 128 A. L. R. 575, clearly demonstrate the ease with which courts have met the situations, arguments and assertions that defendants allege to be so difficult to control.

On the other hand, in *Rowe* v. *Burt's, Inc.* (Ct. of App., Ohio), 31 N. E. 2d 725; *State ex rel. Bricker* v. *Buhl Optical Co.,* 131 Ohio St. 217, 2 N. E. 2d 601, and similar cases, the courts have been able to recognize the absence of lay control of professional practice or lay disturbance of professional relationships involved in a bona fide lease of office space by a retail establishment and to permit honest business arrangements of this nature to stand. Certainly, the courts of Oklahoma are confronted daily with more difficult factual problems in more vital circumstances. It is submitted that restrictions upon the rights of optometrists and ophthalmologists to locate their offices where they will, cannot be constitutionally predicated solely on relieving the judicial and administrative officers of Oklahoma of the necessity of bearing a burden of proof which has been easily and frequently carried by comparable officers of sister states.

The second fallacy involved in the defendants' position is that the means determined upon by the State of Okla-

[36] And also by the Attorney General of Mississippi in his *amicus curiae* brief, pp. 12-30.

homa have any reasonable relation to the end sought. As pointed out in *Sears, Roebuck & Co. et al.* v. *State Board of Optometry, supra,* p. 732, the factual bases supporting a prohibition against the employment of professional optometrists by lay persons lies in the following theory:

> "'* * * The fact that the optometrist is the employee of an optical concern whose main interest is the sale of optical goods tends to be a distracting influence which may adversely affect his loyalty to the interests of his patient.'"

The basic aim of the state in statutes prohibiting the employment of optometrists or physicians by lay persons is the elimination of the chance of domination of the professional decisions of the practitioner by commercial interests. Obviously, such a chance arises only where the retail establishment sells eyeglasses. Yet, the present statute prohibits leasing of space in a dry goods store or a bicycle shop, for example. Even if it be assumed that the legislative policy was directed solely at relationships in which at some stage by some person eyeglasses are sold, it is still necessary to examine whether an optometrist renting office space from a retail establishment is any more likely to be dominated by commercial interests than an optometrist practicing in his own offices. Remembering that the state has appropriate means to prosecute an optometrist who is, in fact, operating as an employee of a commercial establishment, it seems clear that a professional man officing in a retail establishment selling eyeglasses, with no financial interest in prescribing eyeglasses, except the fee which he receives for his examination, has much less inducement to prescribe eyeglasses than the optometrist practicing in his own office who invariably sells the eyeglasses he prescribes. So long as the sale of eyeglasses is allowed by the State of Oklahoma to remain

a major economic part of the practice of optometry, the state may not legislate against a purely theoretical commercial influence supposed to affect the method of practice of one optometrist while leaving untouched direct, personal commercial interests actually dominating the permitted methods of practice of other optometrists. Until the State of Oklahoma is prepared to prohibit profit from the sale of eyeglasses from exercising its undeniable effect upon the decisions of professional optometrists by prohibiting their dealing in such merchandise, the effect of provisions such as Section 4 is not to eliminate or minimize commercial influence in the prescription of eyeglasses, but simply to legislate against a weak commercial interest in favor of a stronger and to encourage and enhance the monopoly of optometry in the sale of eyeglasses.

It would appear that the actual objective of this legislation is the elimination of the competition in the dispensing of eyeglasses experienced by optometrists from the dispensing departments of retail establishments. There is no evidence in this record which remotely tends to prove either that the eyeglasses so dispensed are of lesser quality than those dispensed by opticians or optometrists located in other retail space or that the examination and professional advice afforded is one iota less competent. In fact, Dr. Lemoine in testifying that in his opinion there was no relationship between the competency of an optometrist (or ophthalmologist) and the occupation of his landlord said:

> "It is my feeling that a person can work under any conditions anywhere and still be, you might use the term intellectual honesty—the working conditions have nothing to do with it. If you look at it in that aspect, competency is an individual quality in a person, as far as I am concerned, and if they have character they can work anywhere, middle of the street

or any place, and they can still retain their ability to work perfectly all right. So I would say in a general manner that way it should make no difference, because I still think that the whole thing is a personal function, and whether I like the idea or not is a different thing, but I see no reason why a person couldn't be completely competent working in a retail store or anywhere else, as far as his compentency is concerned. * * *

"I think it applies to anybody in any function of life. If they are ethical and have high standards, they can be competent any place, and if they aren't that way it won't make any difference where you put them, they are not going to be" (R. 378-379).

It is argued that a professional man who practices in a retail establishment may be affected by the profit motives of his lessor. It should be remembered, however, that the optometrist, who practices in his own downstairs store or office, sells his own prescribed glasses and thus himself realizes the profit involved. If the profit motive be the guide of legislation, then obviously the practitioner, such as Plaintiff Rips, practicing in leased retail space and collecting only an examination fee, has much less to gain by prescribing eyeglasses, than the optometrist who prescribes and makes the sale himself. A profit to others is much less seductive than a profit to oneself. As mentioned before, contrary to all other fields of strictly professional endeavor, the professional optometrist is today a man whose major source of income derives from the appliances he prescribes. The legislature cannot deal with this profession in a vacuum. It cannot lawfully deny to one practitioner the right to practice where he will, simply because of theoretical suspicions that a third party's profit motives may enter into the discharge of his professional duties, when, in fact, a more compelling personal profit in-

centive is apparent if he practices where and in the manner the legislature prescribes. So long as in this particular field of professional endeavor, the dispensing of merchandise is a vital part of the professional act, then all prior legal principles designed to protect and purify the learned professions from the inroads of mercantile influence must be set apart, for they have no application to a field of professional activity in which the sale of merchandise by the practitioner himself is a predominant and lawful part.

The utter inconsistency of defendants' and the American Optometric Associations' argument with respect to Section 4 is illustrated pointedly by the following. Defendants and the American Optometric Association state that the purpose of House Bill No. 953 is to assure the people of Oklahoma of the best possible visual care and that only licensed physicians and optometrists be permitted to make eye examinations (§ 941, 59 Okla. St. Ann.; Defendants' brief, p. 18; Brief, American Optometric Association, *amicus curiae,* p. 10). With these objectives plaintiffs agree. But when it comes to attempting to justify the reasonableness of Section 4's prohibition against the rental of space in a retail establishment to an ophthalmologist or optometrist, the American Optometric Association makes the following argument (*amicus curiae* brief, pp. 52-54): "[A state] can require that optometry and medicine not be practiced from door-to-door or outside of an office or fixed place of business. * * * That being so, it certainly can require that optometry and ophthalmology not be practiced in the middle of a department store. The public is attracted into a department store or other retail merchandise establishment for a variety of reasons. An attractive advertisement, a special bargain sale, the need for an article of clothing, or the mere desire to go shop-

ping may attract an individual into a store. But no one of these reasons should be the occasion for a professional eye examination. It cannot be doubted that the presence of an optometrical or ophthalmological department in a retail establishment would tend to induce many people who had entered the store for wholly different and unrelated purposes to have their eyes examined there."

The argument proves that the rental of space in a retail store would result in professional eye examinations that would not otherwise occur. The American Optometric Association attempts to avoid this obvious inconsistency in its argument by saying that the resultant "good" is "not the point"—that the "evils" are professional services resulting from advertisements or "obtained as a mere incident to a downtown shopping trip to a department store." Moreover, that the "evil does not lie in the fact that an examination was had, but in the fact that the particular optometrist or physician was consulted, not because of any particular professional skill, but because he happened to be located in the middle of a retail commercial establishment." The answer to all of the above is that neither the ophthalmologist nor optometrist in Oklahoma can advertise, so the examination cannot result from such advertising. Secondly, whether or not the examination is incidental to a trip to a department store is immaterial. The same is frequently true where the ophthalmologist has his office on the twentieth story of an office building. Lastly, the competence of the practitioner in the retail establishment is in no way determined by his location or by anything in House Bill No. 953. In this latter connection, the testimony of Dr. Cordes (R. 300-301) and Dr. Lemoine (R. 397-400) is revealing.

The law is clear that unjustifiable restrictions upon the use of real property cannot be sustained under the police

power. Thus, in the case of *Curran Bill Posting and Distributing Co.* v. *City of Denver*, 47 Colo. 221, 107 Pac. 261, the court said, page 263:

> "* * * The natural right one may have to use his own property as he wills is subject always to the limitation that in its use others shall not be injured. That which is hurtful to the comfort, safety, and welfare of society may always be prohibited under the inherent or plenary power of the state, notwithstanding the incidental inconvenience or loss individuals may suffer thereby. * * * It is equally true, however, that the owner of property has the right to put it to any use he desires, provided in so doing he does not imperil or threaten harm to others. Legislative restrictions of the use of property are imposed only upon the theory of necessity; that is, they are necessary for the safety, health, comfort, or general welfare of the public."

Nor can the restrictions imposed by Section 4 of House Bill No. 953 be upheld as analogous to zoning restrictions. Zoning regulations "* * * find their justification in some aspect of the police power, asserted for the public welfare * * *," but circumstances justifying the restriction must be shown, *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 387. For example, in *Pacific Palisades Ass'n* v. *City of Huntington Beach*, 196 Cal. 211, 237 Pac. 538, plaintiff brought an action to enjoin the City of Huntington Beach from attempting to enforce the provisions of an ordinance that prohibited persons from erecting derricks, installing machinery and drilling oil wells on lands within the city limits. Plaintiff owned thirteen acres of land within the city limits. In reversing the trial court's order sustaining a demurrer to the complaint the Supreme Court of California said, page 539:

> "It is alleged that the respondent city arbitrarily and without reason adopted the ordinance prohibiting

the drilling of oil on appellant's land, and that its action is unreasonable, arbitrary, and discriminatory. In support of these general averments it is alleged that the property of appellant is proven oil land, and is situate upon the principal oil-bearing district of the city of Huntington Beach. Within 500 feet of appellant's easterly line there are now producing wells, and within 900 feet of its property there are no less than 20 completed wells. * * *

"* * * While the use to which one may put his property may be restricted or regulated by the state, in the exercise of its police power, so far as it may be necessary to protect others from injury from such use, *it is elementary that the enjoyment of the property cannot be interfered with or limited arbitrarily. In re Kelso,* 147 Cal. 609, 611, 82 P. 241, 2 L. R. A. (N. S.) 796, 109 Am. St. Rep. 178. It must be taken as very definitely settled in this state that the right to zone may be resorted to by municipalities upon a proper invocation of the police power. *Miller* v. *Board of Public Works* (Cal. Sup.), 234 P. 381; *Zahn* v. *Board of Public Works* (Cal.), 234 P. 388. But such zoning must be reasonably necessary and reasonably related to the health, safety, morals or general welfare of the community. * * *" (Emphasis added.)

Judged by these tests, it is clear that Section 4 is invalid in prohibiting the use of private property. The use that Plaintiff Rips desires to make of his leasehold interest is not dangerous to the public, the rights of others are not affected, and it is no more aesthetically displeasing than any other land use in a city's business district. It might also be pointed out that, although plaintiff's use is forbidden, Section 4 does not prohibit an optometrist from leasing prime retail space immediately adjacent to a retail store. This fact demonstrates that the restriction upon the use of property imposed by Section 4 is unnecessary, capricious and arbitrary.

B. Section 4 impairs the obligation of contracts and is, therefore, unconstitutional.

The value of Dr. Rips' lease was shown to be $25,000. Yet, Section 4 strikes down this lease and thus impairs the obligations of a private contract in violation of Article I, Section 10, of the Constitution of the United States upon the asserted ground that such a lease might conceivably permit corporate practice. The obligations of private contracts cannot validly be impaired by an exercise of the police power which is not genuinely for a bona fide public purpose or in which the means are not reasonably related to the end sought. Obviously, the degree of merit of an eye examiner or one giving visual care has no connection with the occupation of such examiner's landlord.

In a case in which this Court declared an alleged police measure to be an unconstitutional impairment of private contracts on the ground that only private rights, and not public interests, were being affected, this Court said, "* * * Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive." *Treigle* v. *Acme Homestead Asso.*, 297 U. S. 189, 197. And, in *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 108-109, it was said, pages 108-109:

> "Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power but we have repeatedly said that, in order to have this effect, the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adapted to that end * * *."

Most certainly no public end is being served by Section 4's arbitrary prohibition against the rental of space in retail stores to persons performing eye examinations. Doctors Cordes and Lemoine both stated that in their opinion the physical location and surroundings of a practitioner's office had no relationship to the quality or standards of his practice (R. 300-301, 378-379). Similarly, even if it be assumed that the prevention of corporate practice is the end sought, the rental prohibition of Section 4 is not a means reasonably adapted to that end, in view of §§510, 585 and 588, 59 Okla. St. Ann.

IV.

The court erred in excluding plaintiffs' offered Exhibit 2.

Plaintiffs' Exhibit 2 (R. 459-462, 220, 265) is a copy of a letter written by W. S. Farmer, an Oklahoma optometrist, on the official letterhead of the Oklahoma Optometric Association under date of March 13th, 1953. The letter was sent to all optometrists belonging to the Oklahoma Optometric Association. It advised them that the optometrists were "off to war" and that the "* * * spreading menace of the dispensing opticians has forced us to introduce * * *" into the Oklahoma legislature House Bill No. 953 and its Senate companion bill, No. 924. The letter concludes by saying, "Two things we do not want. First, we do not want to have our present law amended. Second, we do not want the dispensing opticians licensed to practice." Defendants objected to Exhibit 2 upon the ground that it was incompetent, irrelevant and immaterial and for the further reason that it constituted hearsay evidence (R. 221). The court sustained the objection upon the ground that it was hearsay and immaterial (R. 221, 224, 265).

The hearsay objection was not pertinent because plaintiffs offered Exhibit 2 not for the truth of the statements

contained therein, but rather to show the background of the relations between optometry and opticianry and for the purpose of shedding light upon the conditions and facts existing at the time of and before the enactment of House Bill No. 953. It was offered under such precedents as *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194; *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543; *Hammond* v. *Schappi Bus Line*, 275 U. S. 164; *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405; *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402; *Miller* v. *Schoene*, 276 U. S. 272. In all of the foregoing cases it was held that a court, in passing upon the constitutionality of a statute enacted under the police power, should consider evidence of controlling economic conditions and the special facts existing at and before the enactment of the statute. *Cf. Burke* v. *Kansas State Osteopathic Association*, 111 F. 2d 250 (10th Cir., 1940); *Muller* v. *Oregon*, 208 U. S. 412. See also, "The Presumption of Constitutionality Reconsidered," 36 Col. L. Rev. 283, 285; "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action," 38 Harv. L. Rev. 6, 15-16, and "The Presentation of Facts Underlying the Constitutionality of Statutes," 49 Harv. L. Rev. 631.

It is submitted that under the foregoing authorities Exhibit 2 was material and admissible for the purpose of showing the circumstances existing at the time of, and before, House Bill No. 953 was passed by the Oklahoma Legislature.

Conclusion.

For all of the foregoing reasons, it is respectfuily submitted that the decision of the court below holding portions of Sections 2, 3 and 4 of House Bill No. 953 (59 Okla. St. Ann., §§942-944) unconstitutional should be affirmed, except in so far as it upholds those portions of Section 3 prohibiting the advertising by others than optometrists and ophthalmologists of eyeglasses, lenses and prisms, in which respect it should be reversed.

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February, 1955

APPENDIX.

ENROLLED HOUSE BILL NO. 953.

By: Harkey (McCurtain), Ham, Sandlin, Welch (McCurtain), Vandiver, of the House,
and
Collins, Hope, Cooper, Cowden, Price and Field, of the Senate.

An act relating to visual care: defining terms; prohibiting dishonest and dangerous practices in the sale of optical goods and devices; prohibiting discrimination; making the act cumulative to other laws; making violation a misdemeanor authorizing injunction against violators.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. It is the public policy of the State of Oklahoma that the citizens of Oklahoma shall receive the best possible visual care, through the efforts of well trained and qualified physicians licensed under Chapter 11, Title 59, Oklahoma Statutes and optometrists licensed under Chapter 13, of Title 59, Oklahoma Statutes and that no unqualified person shall be permitted to visually correct for compensation the eyes of another.

SECTION 2. It shall be unlawful for any person, firm, corporation, company, or partnership not licensed under the provisions of Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes 1951, to fit, adjust, adapt, or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or to duplicate or at-

tempt to duplicate, or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision or to give any treatment or training designed to aid human vision, or to represent or hold himself out to the public as being qualified to do any of the acts listed in this Section, except that persons licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes, 1951, may in a written prescription, or its duplicate, authorize any optical supplier to interpret such prescription, and who in accordance therewith may measure, adapt, fit, prepare, dispense, or adjust such lenses, spectacles, eye glasses, prisms, tinted lenses, frames or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomalies of the human eye; and may continue to do the said acts on the aforesaid written prescription, or its duplicate, provided, however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person. Provided that this section shall not prevent a qualified person from making repairs to eye glasses.

SECTION 3. It shall be unlawful for any person, firm, company, corporation or partnership to solicit the sale of spectacles, eye glasses, lenses, frames, mountings, prisms or any other optical appliances or devices, eye examinations or visual services, by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement; or to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eye glasses, lenses, frames, mountings, prisms or other optical appliances for visual correction. Provided, however, that the provisions of this Act shall not render any newspaper or other advertising

media liable for publishing any advertising furnished them by a vendor of said commodity or material; nor shall anything in this Act prevent ethical education publicity or advertising by legally qualified health groups that does not violate presently existing laws of Oklahoma, nor prevent the proper use of ethical, professional notices. Nothing in this Act shall prohibit the sale of ready-to-wear glasses equipped with convexspherical lenses nor sunglasses equipped with plano lenses nor industrial glasses and goggles with plano lenses used for industrial eye protection when sold as merchandise at any established places of business and where the selection of the glasses is at the discretion of the purchaser.

Section 4. It shall be unlawful for any optometrist, physician or other person doing, or purporting or pretending to do eye examination or visual correction to receive or accept any rebate, kick-back, reward or premium from any optical company or any other person, firm or corporation dealing in optical goods, appliances or materials, or knowingly allow or permit any person engaged in or interested in the sale of such optical goods, appliances, or materials, to solicit business for any person licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes. It shall be unlawful for any optometrist, physician, or other person to make an eye examination, or do visual correction in any manner, either directly or indirectly as an employee or associate of a person, firm, corporation, lay body, organization, group or lay person and it shall be likewise unlawful for any corporation, lay body, organization, group or lay person in any manner to make an eye examination or perform any visual correction through the means of engaging the services on a salary, commission or any other compensatory basis of a person licensed under the provisions of Chapters 11 or 13

of Title 59, Oklahoma Statutes, 1951, provided that this sentence shall not apply to the University of Oklahoma School of Medicine and Hospitals, or to a bona fide resident physician of a licensed hospital. No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store. Nothing in this Section shall prohibit a person licensed under Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes, from organizing or maintaining a professional association with other persons so licensed.

SECTION 5. No department, commission, board, official, employee, or agency of the State of Oklahoma, or of any county, municipality or other subdivision of the State of Oklahoma shall, in the performance of its duties and functions in obtaining examination for refractions and visual training or correction for citizens of this state discriminate between persons licensed to perform examination for refraction and visual training or correction within the field for which their respective license entitle them to practice; and no such department, commission, board, official or agency of the state, county, municipality, or other subdivision shall send any resident of the State of Oklahoma out of this state to receive or be furnished such services. This Section shall have no application with respect to any person confined in the University Hospitals.

SECTION 6. Any person, firm, company, corporation, or partnership violating any of the provisions of this Act shall be guilty of a misdemeanor and upon conviction thereof shall be punished for each such offense, as provided by law, and in addition thereto may be enjoined by a court of competent jurisdiction for any further violations of the provisions of this Act. It shall be the manda-

tory duty of the county attorneys of the respective counties to bring such injunction suits when a verified complaint is filed with such county attorney alleging any violations of this Act. This Act shall not supersede other laws, but shall be cumulative to other statutes of the State of Oklahoma.

SECTION 7. If any of the provisions of this Act shall be held by a court of competent jurisdiction to be inapplicable to a specific person or set of circumstances, the same shall not affect the validity of this Act in regard to other persons or circumstances.

SECTION 8. The provisions of Sections 1, 2 and 6 of this Act shall not extend, limit or affect the legal scope of practice of persons licensed under the provisions of Chapter 14, Title 59, Oklahoma Statutes, 1951.

§492. *Practice of medicine—Meaning of term.*—Every person shall be regarded as practicing medicine within the meaning and provisions of this Act, who shall append to his name the letters "M.D.," "Doctor," "Professor," "Specialist," "Physician," or any other title, letters or designation which represent that such person is a physician, or who shall for a fee or compensation treat disease, injury or deformity of persons by any drugs, surgery, manual or mechanical treatment whatsoever.

But nothing in this article shall be so construed as to prohibit the service in the case of emergency, or the domestic administration of family remedies; nor shall this Act apply to any commissioned medical officer in the United States Army, Navy, or Marine Hospital service in the discharge of his professional duties, nor to any legally qualified dentist, when engaged exclusively in the practice of dentistry, nor to any legally licensed optometrist when engaged in the practice of optometry as defined by law, or to any physician or surgeon from another state or

territory when in actual consultation with a legal practitioner of this state, if such physician or surgeon is at the time of said consultation a legal practitioner of medicine or surgery in the state or territory in which he resides, nor to any physician or surgeon residing on the border of the neighboring state, and duly authorized under the laws thereof to practice medicine and surgery therein, whose practice extends within the limits of this state; providing that such physician or surgeon shall not open an office or place to meet patients or receive calls within the limits of this state; provided, that this Act shall not be construed so as to interfere in any way with the practice of those who endeavor to prevent or cure disease or suffering by spiritual means or prayer. Laws 1923, ch. 59, p. 104, §12 (59 Okla. St., 1951 §492).

§581. *Practice of Optometry—Definition.*—The practice of Optometry is defined to be the science and art of examining the human eye and the correcting or relief of ocular abnormalities by the employment of any means, including the use or furnishing of any self-testing device, other than the use of drugs, for the measurement of the powers of vision and the adaptation of lenses or prisms for the aid thereof. Laws, 1927, ch. 80, p. 113, §1; Laws, 1937, p. 95, §1 (59 Okla. St., 1951, §581).

§736.1. *Service, commodity or material requiring examination or prescription prohibited—Hearing aids and trusses excepted.*—No person, firm, or corporation, or a member of any professional group regulated and defined by the Statutes of Oklahoma, shall advertise the price of any service, commodity, or material which requires a prior examination and/or prescription by and/or from a person licensed to practice a healing art in this state as defined by Title 59, Oklahoma Statutes, 1951, to determine the proper service, commodity, or material to be rendered or

delivered to the user or consumer thereof for the purpose of the correction or relief of any abnormalities or deformities of the human body. Provided this Act shall not prohibit the advertisement of hearing aids, and/or trusses. Laws, 1947, p. 359, §1 (59 Okla. St., 1951, §736.1).